

Seery - Cross

203

1 certain breaches of fiduciary duty that are possible based on
2 simple negligence, correct?

3 A They are, and in these instances, they don't -- they don't
4 rise to actionable claims because they're indemnified by the
5 funds.

6 Q Okay. You have to explain that to me. So, the negligence
7 claim is not actionable because someone is indemnifying it?

8 A Typically, there's no way to recover because it's
9 indemnified by the fund that the investor might be in. If it
10 goes beyond that, then it wouldn't be.

11 Q Okay. So there are potential negligence breach of
12 fiduciary duty claims that might be subject to these
13 exculpations and releases that would not be indemnified?

14 A Gross negligence and willful misconduct, certainly.

15 Q Okay. Now, post-confirmation, post-confirmation, if the
16 Debtor, or the Reorganized Debtor, rather, engages in
17 negligence or any actionable conduct, that's when the
18 channeling injunction comes into play, right?

19 A I don't quite understand your question.

20 Q Okay.

21 A Can you repeat that?

22 Q Sure. To your understanding, does the channeling
23 injunction we're looking at right now -- and you can read it
24 if you need to -- does it apply to purely post-confirmation
25 alleged causes of action?

Seery - Cross

204

1 A It does apply to those, yes.

2 Q Okay. And it says that the Bankruptcy Court will have
3 sole and exclusive jurisdiction to determine whether a claim
4 or cause of action is colorable, and, only to the extent
5 legally permissible and as provided for in Article 11, shall
6 have jurisdiction to adjudicate the underlying colorable claim
7 or cause of action.

8 Do you see that, sir?

9 A I do.

10 Q Okay. And this -- the Bankruptcy Court's exclusive
11 jurisdiction here, that would continue after confirmation? Is
12 that the intent behind the plan?

13 A It has -- it says what it says. Will have the sole and
14 exclusive jurisdiction to determine whether a claim is
15 colorable, and then, to the extent permissible, it'll have
16 jurisdiction to adjudicate.

17 Q Okay. Nothing in this plan limits the period of the
18 Bankruptcy Court's inquiry to the pre-confirmation time frame,
19 correct?

20 A I don't believe it does, no.

21 Q Okay. Have you taken into account the potential that this
22 bankruptcy case will eventually be closed with a final decree?

23 A Have I taken that into account?

24 Q Well, do you know what a final decree in Chapter 11 is?

25 A I do.

Seery - Cross

205

1 Q Okay. So, help me understand. If there's a final decree
2 and the bankruptcy case is closed, then who do I go to,
3 because the Bankruptcy Court has exclusive jurisdiction, to
4 get this clearing injunction cleared?

5 MR. MORRIS: Objection to the form of the question,
6 Your Honor.

7 THE COURT: Sustained. Rephrase.

8 MR. RUKAVINA: Okay.

9 BY MR. RUKAVINA:

10 Q Is it the plan's intent, Mr. Seery, that this channeling
11 injunction that we just looked at would continue to apply even
12 after a point in time in which the bankruptcy case is closed?

13 A I don't believe so.

14 MR. RUKAVINA: Again, Your Honor, someone -- I heard
15 someone's phone right when he answered, and I didn't hear his
16 answer, if he could please re-answer.

17 THE WITNESS: I don't -- I don't think if the case is
18 closed that's the intention.

19 BY MR. RUKAVINA:

20 Q Okay. What about if there's a final decree entered?

21 MR. MORRIS: Objection, Your Honor. You know, the
22 document kind of speaks for itself.

23 THE COURT: Overruled. He can answer if he knows.

24 THE WITNESS: Yeah. I don't -- I don't -- I'm not
25 making a distinction between the case being closed and the

Seery - Cross

206

1 final decree. I believe in both instances they'll be pretty
2 close to the same time and we'll make a judgment then as to
3 how to close the case in accordance --

4 Q Okay.

5 A -- with the rules.

6 MR. RUKAVINA: Mr. Vasek, if you'll please scroll up
7 to the beginning of this injunction. A little bit higher.
8 Right there. Right there.

9 BY MR. RUKAVINA:

10 Q The very first clause, Mr. Seery, if you'll read with me,
11 says, Upon entry of the confirmation order -- pardon me --
12 all enjoined parties are and shall be permanently enjoined on
13 and after the effective date from taking any actions to
14 interfere with the implementation or consummation of the
15 plan.

16 Do you see that, sir?

17 A I do, yes.

18 Q What does interfering with the implementation or
19 consummation of the plan mean?

20 A It means in some way taking actions to upset, distract,
21 stop, or otherwise prohibit or hurt the estate from
22 implementing or consummating the plan.

23 Q Okay. And is that intended -- is that clause we just
24 read and you described intended to be very broad?

25 A I -- I think it's -- if the words have meaning, yes, that

Seery - Cross

207

1 it should -- it's pretty broad.

2 Q Okay. Is the Debtor not able to state with more
3 specificity what it would believe interference with the
4 implementation or consummation of the plan would mean?

5 MR. MORRIS: Objection to the form of the question.

6 THE COURT: Sustained.

7 THE WITNESS: I think it's -- I think it's --

8 THE COURT: Sustained.

9 MR. RUKAVINA: Okay.

10 THE WITNESS: I'm sorry.

11 BY MR. RUKAVINA:

12 Q Well, you just gave us four or five examples of what
13 interfering with the implementation or consummation of the
14 plan might be. Why isn't that, those four or five examples,
15 why aren't they listed here?

16 MR. MORRIS: Object to the form of the question.

17 MR. RUKAVINA: Well, Your Honor, I'll withdraw it
18 and I'll argue this at closing argument.

19 THE COURT: Okay.

20 BY MR. RUKAVINA:

21 Q When did the Committee agree to you serving as the
22 Claimant Trustee?

23 A In the late -- in the late fall. I've been contemplated
24 to be the Claimant Trustee. I'm willing to take -- if we can
25 come to an agreement. They have their options open if we

Seery - Cross

208

1 can't come to an agreement on compensation.

2 Q Okay. And since the Committee agreed to you being the
3 Claimant Trustee, you have reached a resolution with UBS,
4 correct?

5 A I don't think so. I think that that was before UBS, the
6 UBS resolution was reached.

7 Q I'm sorry. When did you reach the UBS resolution in
8 principle with UBS?

9 A I don't recall the exact date, but I do recall specific
10 conversations where some of the Committee members were
11 supportive. I didn't know that UBS wasn't, but I assumed
12 that some meant not all. And that was UBS, because I don't
13 think we had a deal yet.

14 Q Well, let me ask the question in a little bit of a
15 different way. Whenever the Debtor reached the agreement in
16 principle with UBS that your counsel described this morning,
17 whenever that point in time was, the Committee had already
18 agreed before that point in time to you serving as Claimant
19 Trustee, correct?

20 A I believe so, yes.

21 Q And is the answer the same with respect to the
22 HarbourVest settlement?

23 A I believe so. With HarbourVest, I believe so as well,
24 yes.

25 Q What about the Acis settlement?

Seery - Cross

209

1 A I don't believe so. I think Acis came first. I don't
2 think we settled on an agreement on Claimant Trustee until
3 after the Acis -- certainly after the Acis agreement, maybe
4 not after the Acis 9019. I just don't recall.

5 Q Okay. And the million-dollar cutoff for convenience
6 class creditors, that number was a negotiated amount with the
7 Committee, correct?

8 A Yes.

9 Q Okay. Thank you, Mr. Seery.

10 MR. RUKAVINA: Your Honor, I'll pass the witness.

11 THE COURT: All right. Just for purposes of time,
12 it's 3:00 o'clock, so you went 48 minutes.

13 Who's next?

14 MR. DRAPER: Mr. Taylor is.

15 THE COURT: All right. Mr. Taylor, go ahead.

16 MR. TAYLOR: Yes, Your Honor. At this time, what we
17 would like the Court to do, we are asking for a brief
18 continuance and to go into tomorrow, and there is a reason
19 for that and I would like to explain it.

20 Mr. Dondero has communicated an offer which we believe to
21 be a higher and better offer than what the plan analysis,
22 even in its most recent iteration that was just changed last
23 night, will yield significantly higher recoveries. Those are
24 guaranteed recoveries. There is a cash component to that
25 offer. There are some debt components, but they would be

Seery - Cross

210

1 secured by substantially all of the assets of Highland.

2 We believe it's a higher and better offer, that the
3 creditors and the Creditors' Committee, Mr. Seery, who
4 obviously has been testifying all day on the stand, may have
5 heard some -- some inkling of it via a text or an email he
6 might have been able to glance at, or maybe not, because he's
7 been too busy, and that's understandable.

8 But we do believe it is a material offer. It is a real
9 offer. And for that reason, we would like to request the
10 Court's indulgence. This has gone rather fast. We believe
11 that in the event that it does not gain any traction, then we
12 could complete this confirmation hearing tomorrow, or it's
13 more than likely that we could. And therefore we would
14 request a continuance until tomorrow morning beginning at
15 9:30 so all the parties can confer, consider that offer, and
16 see if it gains any traction.

17 THE COURT: All right.

18 MR. POMERANTZ: Your -- Your --

19 THE COURT: Go ahead. Mr. Morris? Or who is going
20 to respond --

21 MR. POMERANTZ: Your --

22 THE COURT: -- to that?

23 MR. POMERANTZ: Your Honor, this is Jeff --

24 THE COURT: Mr. Pomerantz?

25 MR. POMERANTZ: This is Jeff Pomerantz. I will

Seery - Cross

211

1 respond.

2 I think right at the beginning of the hearing, or
3 slightly after, I did receive an email from Michael Lynn
4 extending this offer. The email was also addressed to Mr.
5 Clemente. As we have told Your Honor before, if the Committee
6 is interested in continuing negotiations with Mr. Dondero, far
7 be it from us to stand in the way.

8 So what I would really ask is for Mr. Clemente to respond
9 to think if -- to see if he thinks that this offer is worthy.
10 If it's worthy and the Committee wants to consider it, we
11 would by all means support a continuance. If it is not, I
12 think this is just a last-minute delay without a reason. And
13 if there is no likelihood of that being acceptable or the
14 Committee wanting to engage, we would want to continue on.

15 THE COURT: All right. Mr. Clemente, what say you?

16 MR. CLEMENTE: Yes. Yes, Your Honor. Matt Clemente
17 on behalf of the Committee.

18 Obviously, I haven't had a chance to confer with my
19 Committee members, but there's no reason to not continue the
20 confirmation hearing today. I will be able to confer with
21 them over email, et cetera, this evening. There's simply no
22 reason to not continue going forward at this particular point
23 in time, Your Honor.

24 So, although I haven't conferred with the Committee
25 members, that would be what I would recommend to them. And so

Seery - Cross

212

1 my view, the Committee's view, I believe, would be let's
2 continue forward and we'll discuss Mr. Dondero's proposal that
3 I know came across after opening statements this morning, you
4 know, in due course. But I do not believe that a continuance
5 here is necessary or appropriate.

6 THE COURT: All right. Mr. Taylor, that request is
7 denied, so you may cross-examine.

8 MR. TAYLOR: Yes. (Pause.) I'm sorry, Your Honor.
9 I have a couple people that are in my ear. But yes, I'm ready
10 to proceed.

11 THE COURT: Okay.

12 CROSS-EXAMINATION

13 BY MR. TAYLOR:

14 Q Mr. Seery, I believe you can probably largely testify from
15 your memory of the various iterations of the plan analysis
16 versus the liquidation analysis. But to the extent that
17 you're unable to, we can certainly pull those up.

18 Mr. Seery, you put forth or Highland put forth on November
19 24th of 2020 a plan analysis versus a liquidation analysis,
20 correct?

21 A I think that's the approximate date, yes.

22 Q Okay. And do you recall what the plan analysis predicted
23 the recovery to general unsecured creditors in Class 8 would
24 be at that time?

25 A I believe it was in the 80s.

Seery - Cross

213

1 Q And approximately 87.44 percent?

2 A That sounds close, yes.

3 Q Okay. And then just right before -- the evening before
4 your deposition that took place on January 29th, I believe a
5 revised plan analysis versus a liquidation analysis was
6 provided. Do you remember that?

7 A Yes.

8 Q Okay. And what was the predicted recovery to general
9 unsecured creditors under that analysis?

10 A I believe that was --

11 MR. MORRIS: Object to the form of the question. I
12 just want to make sure that we're talking about the -- and
13 maybe I misunderstood the question -- plan versus liquidation.

14 THE COURT: Okay. Could you restate --

15 MR. TAYLOR: I said plan analysis.

16 THE COURT: Plan.

17 THE WITNESS: I believe that that initially was in
18 the -- in the high 60s.

19 BY MR. TAYLOR:

20 Q It was --

21 A Might have been --

22 Q -- 62.14 percent; is that correct?

23 A Okay. Yeah. That sounds -- I'll take your
24 representation. That's fine.

25 Q Okay. And going back to the November 28th liquidation

Seery - Cross

214

1 analysis, what did Highland believe that creditors in Class 8
2 would get under a liquidation analysis?

3 A I don't recall the -- if you just tell me, I'll -- I'll --
4 if you're reading it, I'll agree with -- because I -- from my
5 memory.

6 Q 62.6 percent? Is that correct?

7 A That sounds about right.

8 Q You would agree with me, would you not, that 62.6 cents on
9 the dollar is higher than 62.14 cents, correct?

10 A Yes.

11 Q And so at least comparing the January 28th versus -- of
12 2021 versus the November 24th of 2020, the liquidation
13 analysis actually ended up being higher than the plan
14 analysis, correct?

15 A Yes.

16 Q But there was -- there was some changes also in the plan
17 analysis. I'm sorry. There were some subsequent changes that
18 were done over the weekend that were provided on February 1st.
19 Is that correct?

20 A Yes.

21 Q Okay. And what were -- give us an overview of what those
22 changes were.

23 A What are -- what are you comparing? What would you like
24 me to compare?

25 Q Okay. The January to February plan analysis, what were

Seery - Cross

215

1 the changes? Why did it go up from 62.6 to 71.3?

2 A The main changes, as we discussed earlier, and maybe the
3 only major change, was the UBS claim amount, which went down
4 significantly from the earlier iteration. And then there was
5 the small change related to the RCP recovery, which was a
6 double-count.

7 Q Okay. And you talked about earlier about what assumptions
8 went into these analyses, correct?

9 A Yes.

10 Q And you said these assumptions were always done after
11 careful consideration. Is that a correct summation of what
12 you said?

13 A I think that's fair.

14 Q Okay.

15 MR. TAYLOR: Mr. Assink, could you pull up the
16 November assumptions?

17 BY MR. TAYLOR:

18 Q I believe that's coming up, Mr. Seery. The Court.

19 (Pause.)

20 MR. TAYLOR: And go down one page, please, Mr.
21 Assink. Roll up. The Assumption L.

22 BY MR. TAYLOR:

23 Q So, these are the November assumptions, correct, Mr.
24 Seery?

25 A I believe so, yes.

Seery - Cross

216

1 Q Okay. And what was the assumption that you made after
2 careful consideration regarding the claims for UBS and
3 HarbourVest?

4 A The plan assumes zero, that was L, for those claims.

5 Q Okay. And ultimately what did -- and I believe you just
6 announced this today and made this public today -- what is
7 UBS's claim? What are you proposing that it be allowed at?

8 A \$50 million in Class 8, and then they have a junior claim
9 as well.

10 Q Okay. And what about HarbourVest? What kind of allowed
11 claim did they end up with?

12 A \$45 million in Class 8 and a \$35 million junior claim.

13 Q So your well-reasoned assumption, carefully considered,
14 was off by \$95 million; is that correct?

15 MR. MORRIS: Objection to the form of the question.

16 THE COURT: Overruled.

17 THE WITNESS: The difference between zero and those
18 numbers is \$95 million, yes.

19 BY MR. TAYLOR:

20 Q You solicited creditors of the Highland estate based upon
21 the November plan analysis and liquidation analysis that was
22 provided and that we're looking at right now, correct?

23 A It was one of the bases, yes. It's the plan is what --
24 what we solicited votes for, not the projections.

25 Q But this was included within the disclosure statement; is

Seery - Cross

217

1 that correct?

2 A It's one of the bases. It was included, yes.

3 Q And this is the bases by which you believe that the best
4 interests of the creditors have been met better than a Chapter
5 7 liquidation, correct?

6 A I believe this evidences that the best interest test would
7 be satisfied, yes.

8 Q And so the record is very clear, for this Court and
9 anybody looking at the record, no solicitation was done of the
10 creditor body after the disclosure statement was sent out? No
11 updates were sent, correct?

12 A Updated projections were filed, but no solicitation was --
13 was -- there was only one solicitation. We did not resolicit.
14 That's correct.

15 Q Okay. Mr. Seery, how much are you -- after this plan, or
16 if this plan is confirmed, how much are you going to be paid
17 per month to be the Trustee?

18 A For the Trustee role, \$150,000 per month is the base.

19 Q It's a base amount? On top of that, you're going to
20 receive some sort of bonus amount, correct?

21 A There's two bonuses. There's a bonus for the bankruptcy
22 case, which I'd need Court approval for, and then I'm going to
23 seek a bonus for the Trustee work, which would be a
24 combination of myself and the team for a performance bonus.
25 That's to be negotiated.

Seery - Cross

218

1 To be fair, the Committee or the Oversight Group may not
2 agree to any change, in which case we would not have an
3 agreement.

4 Q And what would happen if you don't come to an agreement,
5 Mr. Seery?

6 A They would have to get a different Plan Trustee.

7 Q Okay. So it's certainly going to have to be greater than
8 zero, correct?

9 A Typically.

10 Q Is it going to be in the nature of three or four percent
11 of the sales proceeds, or have you considered that?

12 A Oh, I'm sorry. Yeah, you mean the bonus? No. I've been
13 thinking -- my apologies. I misunderstood. I thought you
14 meant any number. I haven't -- I haven't had negotiation with
15 them. I'm thinking about looking at the full recovery of the
16 team -- for the team, looking at expected performance numbers,
17 and then trying to negotiate a structure of bonus compensation
18 that would be payable to the whole team, and then allocated by
19 the CEO (garbled) which would be made.

20 Q When predicting the expenses of the Trust going forward in
21 your projections, did you build in an amount for a bonus fee?

22 A No. It wouldn't be part of the expenses. It would come
23 out at the end.

24 Q Okay. So those additional expenses are not shown in the
25 plan analysis, correct?

Seery - Cross

219

1 A No, they're not. It's just not going to be an expense.

2 It'll be a -- as an operating expense. It'll be an

3 expenditure at the end out of distributions.

4 Q Okay. And did you subtract those from the distributions?

5 A No.

6 Q Okay. A Chapter 7 trustee is not going to charge \$150,000

7 or more to monetize these assets, is he?

8 A No.

9 Q Have you priced how much D&O insurance is going to be on a
10 go-forward basis post-confirmation?

11 A I'm sorry. I couldn't -- couldn't hear you.

12 Q Sorry. Let me get closer to my mic. Have you priced what
13 D&O insurance is going to run the Trust on a go-forward basis
14 post-confirmation?

15 A Yes.

16 Q Okay. And what are you projecting that to run?

17 A About \$3-1/2 million.

18 Q And is that per annum for over the two-year life of this
19 plan?

20 A Well, it's the two-year projection period, not life. But
21 I expect that that's for the two-year projection period.

22 Q Okay. So approximately one point -- I'm sorry, you said
23 \$3.5 million, correct?

24 A Yes.

25 Q Okay. So, \$1.75 million per year?

Seery - Cross

220

1 A Yes.

2 Q On top of the minimum \$1.8 million per year that you're
3 going to be paid, correct?

4 A Well, that's -- that's the base compensation. But, again,
5 to be fair to the Oversight Committee, they haven't approved
6 it yet. So the Committee, the Committee reserves their rights
7 to negotiate a total package.

8 Q And there's going to be a Litigation Trustee, correct?

9 A Yes.

10 Q And that Litigation Trustee is going to be paid some
11 amount of compensation, correct?

12 A Yes.

13 Q That has not been negotiated yet, correct?

14 A No, I believe -- I believe the base piece has. But his --
15 I don't know what the contingency fee or if that's been
16 negotiated yet. I don't know.

17 Q And what is the base fee for the Litigation Trustee?

18 A My recollection is it was about \$250,000 a year, some
19 number in that area.

20 Q Thank you. So, at this point, over the two-year period,
21 we're looking at approximately \$3.6 million to you, \$3.5
22 million to the D&O insurance, and approximately \$500,000 base
23 fee to the Litigation Trustee, plus a contingency. Is that
24 correct?

25 A That's probably real close, yes.

Seery - Cross

221

1 Q Okay. And how about U.S. Trustee fees? You've estimated
2 of how much those are going to be during the two-year period,
3 correct?

4 A They're built into the plan up 'til -- I think it's only
5 up until the actual effective date, but I don't recall the
6 specifics.

7 Q Okay. And U.S. Trustee fees, the case is going to stay
8 open and those are going to continue to have to be paid, even
9 after confirmation, correct?

10 A Yes.

11 Q Okay. And do you have an estimate of how much those are
12 going to run per annum or over that two-year period?

13 A I don't recall, no.

14 Q Okay. Well, they're provided within your projections,
15 correct?

16 A Yes.

17 Q Okay. A Chapter 7 trustee would not have to incur any of
18 these costs, would they?

19 A I don't think they'll have to incur Chapter -- U.S.
20 Trustee fees. I don't know whether they would bring on a
21 litigation trustee or not. I would assume, since there's --
22 appear to be valuable claims, they probably would, but perhaps
23 they would do it themselves. So I don't know the specifics of
24 what they would do.

25 Q In preparing your liquidation analysis, did you ask

Seery - Cross

222

1 Pachulski if they would be willing to work for a Chapter 7
2 trustee if one was appointed?

3 A I didn't specifically ask, no.

4 Q Did you ask DIS, your, for lack of a better word,
5 financial advisors in this case, if they would be willing to
6 work with a Chapter 7 trustee?

7 A DSI. No, I did not specifically ask them.

8 Q Okay. All right. Any of the accountants that you're
9 working with, did you ask them if they would be willing to
10 work with a Chapter 7 trustee?

11 A I didn't specifically ask them, no.

12 Q Okay. The proposed plan has no requirements that you
13 notice any potential sale of either Highland assets or
14 Highland subsidiary assets; is that correct?

15 A Do you mean after the effective date?

16 Q Yes.

17 A No, it does not.

18 Q In the SSP sale, which is a subsidiary of Trussway, which
19 is a subsidiary of Highland, or actually it's a sub of a sub
20 of Highland, you conducted the sale of SSP, correct?

21 A The team did, yes. I was part.

22 Q All right. That was not noticed to the creditor body; is
23 that correct?

24 A That's correct.

25 Q And it is the Debtor's and your position that no notice

Seery - Cross

223

1 was required because this was a sub of a sub and therefore
2 this was in the ordinary course?

3 A Not exactly, no.

4 Q Okay. Then what is your position?

5 A It was in the ordinary course. It was -- I believe it's a
6 sub of a sub of a sub, and a significant portion of the
7 interests are owned by third parties.

8 Q It is possible, is it not, that had you noticed this to
9 the larger creditor body, that you might have engendered a
10 competitive bidding situation that might have reached a higher
11 return for investors, correct?

12 A The same possibility is it could have gone lower.

13 Q But it is possible, correct?

14 A Certainly possible.

15 Q In fact, there is normally requirements under the
16 Bankruptcy Code and the Rules that asset sales are noticed out
17 to the creditor body, correct?

18 A Asset sales that -- property of the estate, yes. Other
19 than in the ordinary course, of course.

20 Q I believe you have described Mr. Dondero as being very
21 litigious within this case; is that correct?

22 A I believe so, yes.

23 Q Okay. Did Mr. Dondero initiate any litigation in this
24 case prior to September 2020?

25 A Prior to September? I don't believe so. I don't know

Seery - Cross

224

1 when he filed the claim from NexPoint. It certainly indicated
2 that -- I believe it was from NexPoint. My memory is slightly
3 off here. He filed a claim in -- administrative claim, which
4 effectively is like you're bringing a complaint, against HCMLP
5 for the management of Multi-Strat and the sale of the life
6 settlement policies out of Multi-Strat, which was conducted in
7 the spring.

8 Q And wasn't Mr. Dondero seeking document production related
9 to that sale?

10 A No.

11 Q Okay. I believe that the preliminary injunction that you
12 talked about and were questioned earlier, the plan asks to
13 enjoin (garbled) party from allowing the plan to go effective.
14 Is that correct?

15 A I'm sorry. I didn't understand your question. There was a
16 -- there was a bunch of interference.

17 Q Okay. Sure. I'm sorry about that. I don't know if
18 that's -- I don't think that's me, but --

19 A It may not be. It sounded like someone else.

20 Q The injunction prohibits anybody from interfering with the
21 plan going effective, correct?

22 A The plan injunction?

23 Q Yes.

24 A Yes.

25 Q Okay. Just so I'm clear, is the plan injunction

Seery - Cross

225

1 attempting to strip appellate rights of Mr. Dondero?

2 A No.

3 Q Okay. So, if, for instance, if he were to file any appeal
4 of an order confirming this plan, he wouldn't be in violation
5 of that plan injunction?

6 A I don't think so, because the order wouldn't be final.

7 Q Okay. But it -- it says upon entry of a confirmation
8 order, you're enjoined from doing so. So that's not the
9 intent?

10 A It certainly would not be my intent. I don't think that
11 anybody had that in mind.

12 Q Okay. And if Mr. Dondero were to seek a stay pending
13 appeal either during that 14-day period or afterwards, is that
14 plan injunction attempting to stop that -- that sort of
15 action?

16 A I apologize. You're breaking up. But I think I
17 understood your question. No, it was -- it was your screen as
18 well. No. If either this Court stays its own order or a
19 higher court says that the order is stayed, then there would
20 be no way there could be any allegation that it's interfering
21 with an order if it's not effective.

22 Q Mr. Dondero opposed the Acis sale, correct?

23 A The Acis settlement?

24 Q Correct.

25 A Yes.

Seery - Cross

226

1 Q After he opposed the Acis settlement, the next filing Mr.
2 Dondero made was requesting that the Debtor notice the sale of
3 any assets or any major subsidiary assets. Is that correct?

4 A I don't recall the sequence of his filings. I think that
5 Judge Lynn at least sent a letter to that effect. I don't
6 recall if there is a filing to that effect.

7 Q Did Mr. Dondero, through his counsel, attempt to resolve
8 that motion without filing anything further?

9 A I don't recall the specifics of the motion. I know they
10 asked for some sort of relief that -- that we thought was
11 inappropriate.

12 Q When the Court postponed any hearing on Mr. Dondero's
13 request for relief until the eve of the confirmation hearing,
14 and Mr. Pomerantz announced that no sales were expected before
15 confirmation, did Mr. Dondero withdraw his motion?

16 A Again, I don't recall the specifics of the motion. I only
17 recall the letter from Judge Lynn.

18 Q Did Mr. Dondero do anything more than object to the
19 HarbourVest deal?

20 A Not that I know of.

21 Q Did Mr. Dondero do anything more than respond to the
22 Defendants' injunction suit?

23 MR. MORRIS: Objection to the form of the question.
24 I mean, -- objection to the form.

25 THE COURT: Overruled.

Seery - Cross

227

1 MR. TAYLOR: I apologize. I should have said the
2 Debtor's injunction suit.

3 THE WITNESS: Yeah, the -- I'm not sure of the
4 specific order, but certainly the communications with me,
5 which I think are prior to the order. The communications with
6 Mr. Surgent, which I believe are after the order. Certain
7 communications with Mr. Waterhouse, which were oral. Those
8 were all similarly difficult and obstreperous actions.

9 BY MR. TAYLOR:

10 Q Has Mr. Dondero commenced any adversary proceeding or
11 litigation in this case other than filing a competing plan?

12 MR. MORRIS: Objection to the form of the question.

13 THE COURT: Over --

14 THE WITNESS: Yeah, I don't --

15 THE COURT: -- ruled.

16 THE WITNESS: I don't believe he's commenced an
17 adversary. I'm sorry, Judge. I don't believe he's commenced
18 an adversary proceeding, no.

19 BY MR. TAYLOR:

20 Q Mr. Dondero didn't file any opposition to the life
21 settlement sale, did he?

22 A We didn't do the life settlement (garbled) Court.

23 Q Right. Again, that wasn't noticed through the -- this
24 Court, was it?

25 A It was an -- the reason was it was an asset of Multi-Strat

Seery - Cross

228

1 Fund. It wasn't an asset of the Debtor's.

2 Q Okay. Mr. Dondero did have concerns regarding the life
3 settlement sale, correct?

4 A Yes.

5 Q In fact, he believed that they were being sold for
6 substantially less than what could have otherwise been
7 received, correct?

8 A He may have.

9 Q And if you conduct any subsequent sales for less than
10 market value that might ultimately prevent the waterfall from
11 ever reaching Mr. Dondero, he would have no recourse under
12 this proposed plan to object to this sale or otherwise have
13 any comment on it. Is that correct?

14 A I clearly object to the thinking that that was less than
15 market value. It was -- it was more than market value. So I
16 don't -- I disagree with the premise of your question.

17 Q So, I don't believe that was the question that was asked.
18 The question that was asked is, as you move forward with your
19 -- what I will characterize as a wind-down plan, not putting
20 that word in your mouth -- but as you execute forward on your
21 plan, as these sales of these assets go through, no notice is
22 going to be provided, correct?

23 A Not necessarily. It depends on the asset and what we
24 think of the, you know, the -- the position of the parties at
25 the time.

Seery - Cross

229

1 If we have a -- if we have a transaction that's pending
2 that wouldn't be hurt by a notice and that we'd be able to get
3 the Court's imprimatur to maybe more better insulate, if you
4 will, against Mr. Dondero's attacks, then we may well come to
5 the Court to seek that.

6 The problem with noticing sales is that -- that it often
7 depresses value. That's just not the way folks outside of the
8 bankruptcy world (audio gap) sales.

9 Q So there's no requirement that either public or private
10 notice be provided, correct?

11 A No. Meaning it is correct.

12 Q Okay. And if Mr. Dondero had objections either to the
13 pricing of the sale or the manner and means by which the sale
14 was being conducted, he would be prohibited by the plan
15 injunction from bringing any objection to such sale, correct?

16 A I believe so, yes.

17 Q Mr. Dondero also had concerns regarding the OmniMax sale,
18 correct?

19 A Mr. Dondero did not go along with the OmniMax sale with
20 the assets that he managed. I don't know if he had concerns
21 with -- with our sale or OmniMax's interests.

22 Q Did Mr. Dondero ever express to you any concern that the
23 value wasn't being maximized regarding the sale of those
24 assets?

25 A He thought he could get more. I don't know that he

Seery - Cross

230

1 thought that he could get more for his assets that he was
2 managing or whether he thought he could get more for all of
3 the assets.

4 Q Other than voicing those concerns, did Mr. Dondero file
5 any pleading with this Court attempting to block that sale?

6 A Pleading with the Court? No.

7 MR. TAYLOR: Your Honor, I would like to confer with
8 my colleagues just very briefly and see if they have anything
9 further. And even if they don't, Mr. Lynn of my firm would
10 like a very brief moment to address the Court prior to me
11 passing the witness.

12 So, if I may have a literally hopefully one-minute break
13 where I can turn my camera off and my microphone off to confer
14 with my colleagues, and then move forward?

15 THE COURT: Okay. Well, you can have a one-minute
16 break, but we're going to continue on with cross-examination
17 at this point. Okay? I'm not sure what you meant by Mr. Lynn
18 wants to raise an issue at this point. Could you elaborate?

19 MR. TAYLOR: I will get some elaboration during our
20 30-second to one-minute break, Your Honor. I was just passed
21 a note.

22 THE COURT: All right. So, but I'll just you know,

23 --

24 A VOICE: Your Honor?

25 THE COURT: -- I'm inclined to continue with the

Seery - Cross

231

1 cross-examination. You know, this isn't a time for, you know,
2 arguments or anything like that. All right?

3 So, we'll take a one-minute break. You can turn off your
4 audio and video for one minute, and come back.

5 (Off the record, 3:33 p.m. to 3:34 p.m.)

6 THE WITNESS: Your Honor?

7 THE COURT: Yes?

8 THE WITNESS: It's Jim Seery. Can I turn it into
9 just a two-minute break, since I've sat in my seat, and it
10 would be better for him to just continue straight through. I
11 could use one or two minutes.

12 THE COURT: Okay.

13 THE WITNESS: I apologize.

14 THE COURT: All right. Well, it's been more than
15 minute. Let's just say a five-minute break for everyone, and
16 we'll come back at 3:39 Central time. Okay.

17 THE WITNESS: Okay. Thank you, Your Honor. I
18 appreciate that.

19 (A recess ensued from 3:35 p.m. until 3:40 p.m.)

20 THE CLERK: All rise.

21 THE COURT: Please be seated. All right. We are
22 back on the record. Mr. Taylor, are you there?

23 MR. TAYLOR: I am, Your Honor. My video is not
24 wanting to start, but my -- I believe my audio is on.

25 THE COURT: Okay. After you went offline for your

Seery - Cross

232

1 one-minute break, Mr. Seery asked for a five-minute bathroom
2 break, or a couple-minute. Anyway, we've been gone on a
3 bathroom break. We're back now.

4 MR. TAYLOR: Thank you. I was actually -- I was
5 still listening with one ear, --

6 THE COURT: Okay.

7 MR. TAYLOR: -- Your Honor, so I understand.

8 THE COURT: All right.

9 MR. TAYLOR: So, thank you.

10 THE COURT: Are you finished with cross, or no?

11 MR. TAYLOR: Just a little bit of a follow-up.

12 CROSS-EXAMINATION, RESUMED

13 BY MR. TAYLOR:

14 Q Mr. Seery, you had previously testified that Mr. Dondero's
15 counsel had threatened you and/or the independent board, I was
16 not exactly sure who you were referring to, with suits, and I
17 believe you said a hundred million dollars' worth of suits and
18 getting dragged into litigation.

19 Is that still your testimony today, that you were -- you
20 were threatened with suit by this firm of a suit of over a
21 hundred million dollars?

22 A I believe what I was told by my counsel was that, not Mr.
23 Dondero's, but one of the other counsel, who I can name, said
24 specifically that Dondero will sue Seery for hundreds of
25 millions of dollars. We're going to take it up to the Fifth

Seery - Cross

233

1 Circuit, get it reversed, and he'll go after him.

2 Q Okay. So it was not Mr. Dondero's counsel, and you were
3 not -- is that correct?

4 A No. It was one of the other counsel on the phone today.

5 Q Okay. And you base that not upon your own personal
6 knowledge but based on some -- something else that you were
7 told, correct?

8 A Yes. By my counsel.

9 Q Thank you.

10 MR. TAYLOR: Yes, Your Honor. We can pass the
11 witness.

12 THE COURT: Okay. So, you've gone, or you and Mr.
13 Rukavina collectively have gone one hour and 17 minutes. Mr.
14 Draper, you're next.

15 MR. DRAPER: Yes, Your Honor. Thank you. I
16 basically have no more than ten questions, so I gather the
17 Court will welcome that.

18 THE COURT: Okay.

19 CROSS-EXAMINATION

20 BY MR. DRAPER:

21 Q Mr. Seery, has the new general partner been formed yet?

22 A I don't know if they've been -- we've actually done the
23 formation, but it -- it would be in process.

24 Q So it either has been formed or has not been formed?

25 A I don't -- I don't know the answer.

Seery - Cross

234

1 Q Okay. Now, going forward, Judge Nelms and Mr. Dubel will
2 have nothing to do with the Reorganized Debtor, correct?

3 A Not necessarily, but they don't have a specific role at
4 this time.

5 Q They won't be officers or directors of the new general
6 partner or the Reorganized Debtor, correct?

7 A I don't -- I don't believe so, but it's not set in stone.

8 Q All right. Has any finance -- has any party who is the
9 beneficiary of an exculpation, a release, or the channeling
10 injunction contributed anything to this plan of reorganization
11 in terms of money?

12 A No.

13 Q Have you ever interviewed a trustee as to how they would
14 liquidate the assets or monetize the assets in this case?

15 A No.

16 Q And last question is, is there any bankruptcy prohibition
17 that you're aware of that a Chapter 7 trustee could not do
18 what you're doing?

19 A Which -- which -- what do you mean, under the plan?

20 Q No. Could not monetize the assets of the estate in the
21 manner that you're attempting to monetize them.

22 A I don't think there's a specific rule, but I just haven't
23 -- I haven't seen that before, no. So I don't think there's a
24 specific rule that I know of.

25 Q Okay.

Seery - Cross

235

1 MR. DRAPER: I have nothing further for this witness.

2 THE COURT: All right. I should have asked, we had a
3 couple of other objectors. Ms. Drawhorn, did you have any
4 questions?

5 MS. DRAWHORN: I have no questions, Your Honor.

6 THE COURT: All right. Were there any other
7 objectors out there that I missed that might have questions?

8 All right. Any redirect?

9 MR. MORRIS: Your Honor, if I may, can I -- can I
10 just take a short minute to confer with my colleagues?

11 THE COURT: Sure. You can --

12 MR. MORRIS: Thank you.

13 THE COURT: -- put you --

14 MR. MORRIS: Two -- two minutes, Your Honor.

15 THE COURT: Okay.

16 (Pause, 3:45 p.m. until 3:48 p.m.)

17 THE COURT: All right. We've been a couple of
18 minutes. Mr. Morris?

19 MR. MORRIS: Yes, Your Honor.

20 THE COURT: What are --

21 MR. MORRIS: Just, just a few points, Your Honor.

22 THE COURT: Okay.

23 MR. MORRIS: Hold on a sec. You ready, Mr. Seery?

24 THE WITNESS: I am, yes.

25 REDIRECT EXAMINATION

Seery - Redirect

236

1 BY MR. MORRIS:

2 Q You were asked a number of questions about your
3 compensation. Do you recall all that?

4 A Yes, I do.

5 Q And you testified to the \$150,000 a month. Do you recall
6 that?

7 A Yes.

8 Q Under the -- under the documentation right now, your
9 compensation is still subject to negotiation with the
10 Committee; is that right?

11 A Yes, it is.

12 Q Okay. You were asked a couple of questions about the
13 conduct of Mr. Dondero. Earlier, you testified that the
14 monetization plan was filed under seal at around the time of
15 the mediation. Do I have that right?

16 A Yes. Right at the start of the mediation.

17 Q Okay. And is that the first time that the Debtor made the
18 constituents aware, including Mr. Dondero, that it intended to
19 use that as a catalyst towards getting to a plan?

20 A That's the first time that we filed it, but that plan had
21 been discussed prior to that.

22 Q And do you recall that there came a point in time where
23 you -- when the Debtor gave notice that it intended to
24 terminate the shared services agreements with the Dondero-
25 related entities?

Seery - Redirect

237

1 A Yes.

2 Q And when did that happen?

3 A That was about 60 -- now it's like 62 days ago.

4 Q Uh-huh. And you know, from your perspective, from the
5 filing of the monetization plan in August through the notice
6 of shared services, is that what you believe has contributed
7 to the resistance by Mr. Dondero to the Debtor's pursuit of
8 this plan?

9 A Well, I think there's a number of factors that
10 contributed, but the evidence that I've seen is that when we
11 started talking about a transition, if there wasn't going to
12 be a deal, if Mr. Dondero couldn't reach a deal with the
13 creditors, we were going to push forward with the monetization
14 plan. And the monetization plan required the transition of
15 the employees. And indeed, it called specifically, and we had
16 testimony regarding it all through the case, about the
17 employees being terminated or transferred.

18 In order to transfer them over to an entity that's
19 related, Mr. Dondero pulls all of those strings. And he
20 refused to engage on that. We started in the fall. We
21 specifically told employees of the Debtor not to engage. They
22 couldn't spend his money, which made sense --

23 MR. TAYLOR: Objection, Your Honor.

24 THE WITNESS: So, very -- that --

25 THE COURT: Just -- there's an objection.

Seery - Redirect

238

1 MR. MORRIS: There's an objection.

2 THE WITNESS: I'm sorry.

3 THE COURT: There was an objection.

4 MR. TAYLOR: Yes, Your Honor. Object --

5 THE COURT: Go ahead.

6 MR. TAYLOR: Yes, Your Honor. This is Clay, Clay
7 Taylor. Objection. He's directly said Mr. Dondero told other
8 employees x, and that is purely hearsay, not based upon his
9 personal opinion, or his personal knowledge, and therefore
10 that part of the answer should be struck.

11 MR. MORRIS: Your Honor, it's a statement against
12 interest.

13 THE COURT: Overrule the objection. Go ahead.

14 THE WITNESS: Yeah. The difficulty of transitioning
15 this business, I've equated it to doing a corporate carve-out
16 transaction on an M&A side. It's hard, and you need
17 counterparties on the other side willing to engage. And what
18 we went through over the weekend, on Friday, was seemingly
19 that the Funds, you know, directed by Mr. Dondero, just
20 haven't engaged.

21 We actually gave them an extra two weeks to engage,
22 because it's -- they've really been unable to do anything. I
23 mean, hopefully, we've got the employees working in a way that
24 can -- that can foster and get around some of this
25 obstreperousness, and I've used that word before, but that's

Seery - Redirect

239

1 what it is. It's really an attempt to just prevent the plan
2 from going forward.

3 And at some point, the plan will go forward. And if we
4 are unable to transition people, we will simply have to
5 terminate them. And that is not a good outcome for those
6 employees, but it's not a good outcome for the Funds, either.
7 And the Funds, Mr. Dondero, the Advisors, the boards, nobody
8 wants to do anything except come in this court.

9 BY MR. MORRIS:

10 Q Do you recall being asked about Mr. Dondero and certain
11 things that he didn't do and certain actions that he hadn't
12 taken?

13 A Yes.

14 Q By Mr. Taylor? To the best of your recollection, did Mr.
15 Dondero personally object to the HarbourVest settlement?

16 A I -- I don't recall if he did or if it was one of the
17 entities.

18 Q It was Dugaboy. Does that refresh your recollection?

19 A Dugaboy certainly objected, yes.

20 Q And do you understand that Dugaboy has appealed the
21 granting of the 9019 order in the HarbourVest settlement?

22 A Yes.

23 Q And Mr. Taylor asked you to confirm that Mr. Dondero
24 hadn't taken any action with respect to the life settlement
25 deal. Do you remember that?

Seery - Redirect

240

1 A I do.

2 Q But are you aware that Dugaboy actually filed an
3 administrative claim relating to the alleged mismanagement of
4 the life settlement sale?

5 A Yes, I did, I did allude to that. I wasn't sure it was
6 Dugaboy, but -- but that was very --

7 Q Uh-huh.

8 A -- very early on, an objection filed in the form of an
9 administrative claim or complaint against, if you will,
10 against Highland for the management of Multi-Strat.

11 Q Uh-huh. And Mr. Dondero didn't personally file any motion
12 seeking to inhibit the Debtor from managing the CLO assets; is
13 that right?

14 A No, not the CLO assets, no.

15 Q Yeah. But the Funds and the Advisors did. That was the
16 hearing on December 16th. Do you recall that?

17 A Yeah. That was the -- the Funds. K&L Gates, the Funds,
18 and the various Advisors.

19 Q All right. Do you recall Mr. Rukavina asking you whether
20 there was any evidence in the record to support your testimony
21 that there was an agreement in place to assume the CLO
22 management agreements?

23 A I recall the question, yes.

24 Q Okay.

25 MR. MORRIS: Your Honor, I'm going to ask Ms. Canty

Seery - Redirect

241

1 to put up on the screen the Debtor's omnibus reply to the plan
2 objections.

3 THE COURT: Okay.

4 MR. MORRIS: It was filed -- it was filed on January
5 22nd. And if we can go, I think, to -- I think it's Paragraph
6 -- I think it's Paragraph 135 on Page 71. Yeah. Okay.

7 BY MR. MORRIS:

8 Q Take a look at that, Mr. Seery. Does that -- does that
9 statement in Paragraph 135 accurately reflect the
10 understanding that's been reached between the Debtor and the
11 CLO Issuers with respect to the Debtor's assumption of the CLO
12 management agreements?

13 A Yes. I think that's consistent with what I testified to
14 earlier, the substance of the agreement.

15 MR. MORRIS: And if we can just scroll to the top,
16 just to see the date. Or the bottom. I guess the top.

17 THE WITNESS: Do you mean the date of this pleading?

18 BY MR. MORRIS:

19 Q Yeah. So, it was filed on January 22nd, right, ten days
20 ago? Okay.

21 A That's correct.

22 MR. MORRIS: I'd like to put up on the screen an
23 email, Your Honor, that I'd like to mark as Debtor's Exhibit
24 10A. And this is --

25 BY MR. MORRIS:

Seery - Redirect

242

1 Q Do you recall, Mr. Seery, you testified that the agreement
2 was reflected in an email?

3 A Yes.

4 Q Is this the email that you're referring to?

5 MR. MORRIS: If we could scroll down. Right there.

6 THE WITNESS: Yes.

7 MR. MORRIS: Okay. One -- the email below. Okay.

8 Right there.

9 BY MR. MORRIS:

10 Q Is that the -- is that the email you had in mind?

11 A It was the series of emails. We -- we had a -- I think I
12 testified in the prior testimony, or my -- one of my
13 depositions, that we had had a number of conversations with
14 the Issuers and their counsel, and this was the summary of the
15 agreement that was contained in these emails.

16 Q Okay. And this is, this is the same date as the omnibus
17 reply that we just looked at, right, January 22nd?

18 A That's correct.

19 Q Okay. You were asked a question, I think, late in your
20 cross-examination about a Chapter 7 trustee's ability to sell
21 the assets in the same way as you are proposing to do. Do you
22 recall that testimony?

23 A Yes.

24 Q And I think, if I understood correctly, the question was
25 narrowly tailored to whether there was any legal impediment to

Seery - Redirect

243

1 a trustee doing -- performing the same functions as you. Do I
2 have that right?

3 A That's the question I was asked, whether the Bankruptcy
4 Code had a specific prohibition.

5 Q Okay. And I think, I think you testified that you weren't
6 aware of anything. Is that right?

7 A That's correct.

8 Q All right. But let's talk about practice. Do you think a
9 Chapter 7 trustee will realize the same value as you and the
10 team that you're assembling will, in terms of maximizing value
11 and getting the maximum recovery for the assets?

12 A No. As I testified earlier, you know, I've been working
13 with these assets now for a year. It's a complicated
14 structure. The assets are all slightly different. And
15 sometimes much more than slightly. And the team that we're
16 going to have helping managing is familiar with the assets as
17 well. We believe we'll be able to execute very well in the
18 markets that we (garbled).

19 Q Do you think a Chapter 7 trustee will have a steep
20 learning curve in trying to even begin to understand the
21 nature of the assets and how to market and sell them?

22 A I think anybody coming into this, the way this company is
23 set up, as an asset manager, and the diversity of the assets,
24 would have a steep learning curve, yes.

25 Q Do you have any view as to whether the perception in the

Seery - Redirect

244

1 marketplace of a Chapter 7 trustee taking over to sell the
2 assets will have an impact on value as compared to a post-
3 confirmation estate of the type that's being proposed under
4 the plan?

5 A Yes, I do, and it certainly would be negative, in my
6 experience. Typically, assets are not conducted -- asset
7 sales are not conducted through a bankruptcy court, and
8 certainly not with a Chapter 7 trustee that has to sell them,
9 and generally is viewed as having to sell them quickly. So we
10 -- we approach each asset differently, but certainly in a way
11 that would be much more conducive to maximizing value than a
12 Chapter 7 trustee could, just by the nature of their role.

13 Q Is it -- is it your understanding that, under the proposed
14 plan and under the proposed corporate governance structure,
15 that the Claims Oversight Committee will -- will manage you?
16 That you'll report to that Committee and that they'll have the
17 opportunity to make their assessment as to the quality of your
18 work?

19 A Yeah, absolutely. And that's consistent with what we've
20 done before in this case. Even where it wasn't an asset of
21 the estate or was being sold in the ordinary course, we spent
22 time with the Committee and the Committee professionals before
23 selling assets.

24 Q And you've worked with the Committee for over -- for a
25 year now, right?

Seery - Redirect

245

1 A It's over a year.

2 Q And the Committee is comfortable with you taking this
3 role; is that right?

4 A I think they're supportive of it. Comfortable might be
5 not the right word choice.

6 Q Okay. I appreciate the clarification. And do you have
7 any reason to believe that the -- that the Oversight Committee
8 is going to allow you the unfettered discretion to do whatever
9 you want with the assets of the Trust?

10 A Not a chance. Not with this group. Nor would I want to.
11 There's no right or wrong answer for most of these things, and
12 the collaborative views from professionals and people who have
13 an economic stake in the outcome will be helpful.

14 Q Okay. You were asked some questions about the November
15 projections and the -- and the assumption that was made that
16 valued the HarbourVest and the UBS claims at zero. Do you
17 recall that?

18 A Yes.

19 Q As of that time, was the Debtor still in active litigation
20 with both of those claim holders?

21 A Very much so.

22 Q And after the disclosure statement was issued, do you
23 recall that the Court entered its order on UBS's Rule 3018
24 motion?

25 A Yes.

Seery - Redirect

246

1 Q And do you recall what the -- what the claims estimate was
2 for voting purposes under that order?

3 A It was about \$95 million. That was -- it was together
4 with the summary judgment orders of that date. They were
5 separate orders, but that was the lone hearing.

6 Q And was that public information, that order was publicly
7 filed on the docket; isn't that right?

8 A Yes, it was.

9 Q Is there anything in the world that you can think of that
10 would have prevented any claim holder from doing the math to
11 try to figure out the impact on the estimated recoveries from
12 the -- by using that 3018 claims estimate?

13 A No. It would have -- it would have been quite easy to do.

14 Q And, in fact, that's what you wound up doing with respect
15 to the January projections, right?

16 A That's correct.

17 Q And do you recall when the HarbourVest settlement, when
18 the 9019 motion was filed?

19 A I don't recall the actual filing. It was subsequent to
20 the UBS, though.

21 MR. MORRIS: Ms. Canty, if you have it, can we just
22 put it on the screen, to see if we can refresh Mr. Seery's
23 recollection? If we could just look at the very top.

24 BY MR. MORRIS:

25 Q Does that refresh your recollection that the 9019 motion

Seery - Redirect

247

1 was filed on December 23rd?

2 A Yes, it does. The agreement was reached before that, but
3 it took a little bit of time to document the particulars and
4 then to -- to get it filed.

5 Q And this wasn't filed under seal, to the best of your
6 recollection, was it?

7 A No, no. This was -- this was open, and we had a very open
8 hearing about it, because it was a related-party objection.

9 Q And to the best of your recollection, did this 9019 motion
10 publicly disclose all of the material terms of the proposed
11 settlement?

12 A Yes, it did.

13 Q Can you think of anything in the world that would have
14 prevented any interested party from doing the math to figure
15 out how this particular settlement would impact the claim
16 recoveries set forth in the Debtor's disclosure statement?

17 A No. And just again, to be clear, the plan and the
18 projections had assumptions, but the plan was very clear that
19 the denominator was going to be determined by the total amount
20 of allowed claims.

21 Q And, again, at the time that that was filed, you hadn't
22 reached a settlement with HarbourVest, had you?

23 A No.

24 Q And the order on the 3018 motion hadn't yet been filed; is
25 that right?

Seery - Redirect

248

1 A That's correct.

2 Q Okay. Has -- are you aware of any creditor expressing any
3 interest in trying to change their vote as a result of the
4 updates of the forecasts?

5 A Only Mr. Daugherty. And actually, they have a stipulation
6 with the two -- the two former employees.

7 Q All right. But to be fair, that wasn't -- had nothing to
8 do with the revisions to the projections? That was just in
9 connection with their settlement; is that right?

10 A That's correct. As was, I suspect, Mr. Daugherty's, but
11 he'd been aware of the settlements, just like everyone else.

12 Q Okay. You were asked a couple of questions, I think, by
13 Mr. Rukavina about whether there is anything that you need to
14 do your job on a go-forward basis. And I think you said no.
15 Do I -- do I have that right? Nothing further that you need?

16 A I -- I'm not really sure what your question means, to be
17 honest.

18 Q Okay. Fair enough. To be clear, is there any chance that
19 you would accept the position as the Claimant Trustee if the
20 gatekeeper and injunction provisions of the proposed plan were
21 extracted from those documents?

22 A No. As I said earlier, they're integral in my view to the
23 entire plan, but they're absolutely essential to my bottom.

24 Q Okay. And through -- through the date of the effective
25 date, are you relying on the exculpation clause of the -- have

Seery - Redirect

249

1 you been relying on the exculpation clause in the January 9th
2 order that you testified to at the beginning of this hearing?

3 A Yeah. Both the January 9th order as well as the July
4 order with respect to my CEO/CRO positions.

5 Q Okay.

6 MR. MORRIS: I've got nothing further, Your Honor.

7 THE COURT: All right. Any recross on that redirect?

8 A VOICE: I believe Mr. Rukavina is speaking but is
9 muted, Your Honor.

10 THE COURT: Mr. Rukavina, do you have any recross?

11 MR. RUKAVINA: Your Honor, I do, yes. Thank you. I
12 apologize.

13 THE COURT: Okay.

14 MR. RUKAVINA: Can you hear me now?

15 THE COURT: Yes.

16 THE WITNESS: Yes.

17 MR. RUKAVINA: Thank you.

18 Mr. Vasek, if you'll please pull up the Debtor's Omnibus
19 Reply, **Docket 1807**. And if you'll go to Exhibit C. Do a word
20 search for Exhibit C. It's attached to it. Okay. Now scroll
21 down. Stop there.

22 RE CROSS-EXAMINATION

23 BY MR. RUKAVINA:

24 Q Mr. Seery, do you see what's attached as Exhibit C to the
25 Omnibus Reply, which is proposed language in the confirmation

Seery - Recross

250

1 order?

2 A I see the exhibit. I didn't know if this was -- I don't
3 know exactly what it's for. If it's proposed language, I'll
4 accept your representation.

5 MR. RUKAVINA: Well, scroll back up to Exhibit C, Mr.
6 Vasek. I want to make sure that I understand what you're
7 saying. Scroll back up. Do the word search for where Exhibit
8 C appears first. Start again. Okay. So scroll up.

9 BY MR. RUKAVINA:

10 Q So, you'll recall Mr. Morris was asking you about the
11 paragraph in here where you outlined the terms of the
12 agreement with the CLOs. Do you recall that testimony?

13 A Yes.

14 Q Okay. And then you see it says, The Debtor and the CLOs
15 agreed to seek approval of this compromise by adding language
16 to the confirmation order. A copy of that language is
17 attached hereto as Exhibit C and will be included in the
18 confirmation order.

19 Do you see that, sir?

20 A I do.

21 Q Okay.

22 MR. RUKAVINA: Mr. Vasek, go back to Exhibit C.

23 BY MR. RUKAVINA:

24 Q So it's correct that this Exhibit C is the referenced
25 agreement that the Debtor and the CLOs will seek approval of,

Seery - Recross

251

1 correct?

2 A The -- the -- it may be word-splitting, but I believe it
3 says that they've reached agreement and this is the language
4 that will evidence that agreement or embody that agreement.

5 Q Okay.

6 MR. RUKAVINA: Scroll down, Ms. Vasek, to the next
7 page, please.

8 BY MR. RUKAVINA:

9 Q Real quick, do the CLOs owe the Debtor any money for the
10 management fees?

11 A I don't -- well, the answer is there are accrued fees that
12 haven't been paid, but when they have cash they run through
13 the waterfall and pay them.

14 Q And I believe you mentioned to me those accrued fees
15 before. They're several million dollars, correct?

16 A It -- I don't know right off the top of my head. They can
17 aggregate and then they get paid down in the quarter depending
18 on the waterfall. And it's -- it's not a fair statement by
19 either of us to say the CLOs, as if they're all the same.

20 Each one is different.

21 Q I understand. But as of today, you agree that the CLOs
22 collectively owe some amount of money to the Debtor in accrued
23 and unpaid management fees?

24 A I believe that's the case.

25 Q Okay. And do you believe it's north of a million dollars?

Seery - Recross

252

1 A I don't recall.

2 Q Okay.

3 MR. RUKAVINA: Well, scroll down a couple of more
4 lines, Mr. Vasek. Stay there.

5 BY MR. RUKAVINA:

6 Q Sir, if you'll read with me, isn't the Debtor releasing
7 each Issuer, which is the CLOs, for and from any and all
8 claims, debts, et cetera, by this provision?

9 A Claims. Not -- not fees, but claims. I don't believe
10 there's any release of fees that the CLOs might owe and would
11 run through the waterfall here.

12 Q Okay. For and from any and all claims, debts,
13 liabilities, demands, obligations, promises, acts, agreements,
14 liens, losses, costs, and expenses, including without
15 limitation attorneys' fees and related costs, damages,
16 injuries, suits, actions, and causes of action, of whatever
17 kind or nature, whether known or unknown, suspected or
18 unsuspected, matured or unmatured, liquidated or unliquidated,
19 contingent or fixed.

20 Are you saying that that does not release whatever fees
21 have accrued and the CLOs owe?

22 A I don't believe it would. If it did, your client should
23 be ecstatic. But I don't believe it does that.

24 Q And you don't believe that it releases the CLOs of any and
25 all other obligations that they may have to the Debtor and the

Seery - Recross

253

1 estate?

2 A I -- again, I don't believe there are any, but I think
3 it's a broad release of claims away from the actual fees that
4 are generated by the Debtor. I don't believe there's an
5 intention to release fees that have accrued.

6 Q Have you seen this language before I showed it to you
7 right now?

8 A I believe I have, yes.

9 Q Okay. Take a minute. Can you point the Court to anywhere
10 where present or future fees under the CLO agreements are
11 excepted from the release?

12 A I could go through, I'll take your representation, but I
13 don't believe that that's what it -- it's supposed to release
14 fees. Again, if the fees are owed, they get paid, if there
15 are assets there to pay them.

16 Q Okay. This release and this settlement was never noticed
17 out as part of a 9019, was it?

18 A I don't believe so, no.

19 Q Okay. So, other than bringing it up here today, this is
20 the first that the Court, at least, has heard of this,
21 correct?

22 A Yeah, again, I don't --

23 MR. MORRIS: Objection to the form of the question.

24 THE WITNESS: Yeah. I just stated before that I
25 don't think this is a -- that there claims.

Seery - Recross

254

1 THE COURT: Wait. Slow down. I think --

2 MR. SEERY: Oh, I'm sorry, Your Honor.

3 THE COURT: -- there was an objection. Go ahead, Mr.
4 Morris.

5 MR. MORRIS: The notion that this is the first time
6 the Court has heard of this is just factually incorrect.
7 First of all, it's in the document from January 22nd. Second
8 of all, Mr. Seery testified to it last week at the preliminary
9 injunction hearing. I mean, --

10 THE COURT: I -- I --

11 MR. MORRIS: -- I don't know what the point of the
12 inquiry is, but there's -- this is not new news.

13 THE COURT: Okay. I sustain the objection.

14 BY MR. RUKAVINA:

15 Q And Mr. Seery, can you point me to any document where
16 counsel for the CLOs has signed this particular confirmation
17 order or any other document agreeing to this language in the
18 confirmation order?

19 A I don't think there's any document that's signed. I think
20 we already went over that. I think the email is evidence
21 their agreement to the general terms. I don't see any
22 agreement with respect to this particular language.

23 Q Well, you have no personal information? You're going on
24 what your lawyers told you that the CLOs agreed to, correct?

25 A That's correct.

Seery - Recross

255

1 Q Okay. You didn't personally --

2 A Excuse me. That's correct with respect to this language,
3 not with respect to the agreement. I was on the phone when
4 they agreed.

5 Q Okay. And they agreed orally, you're saying, to basically
6 the assumption of the CLO management agreements?

7 A Correct.

8 Q Okay.

9 MR. RUKAVINA: Thank you, Your Honor. I'll pass the
10 witness.

11 THE COURT: All right. Other recross?

12 MR. TAYLOR: Yes, Your Honor, I do.

13 THE COURT: Go ahead.

14 RECROSS-EXAMINATION

15 BY MR. TAYLOR:

16 Q Mr. Seery, Clay Taylor again. You worked -- I'm sorry,
17 let me restart. I believe you testified earlier, in response
18 to questions by Mr. Morris, that you didn't believe a Chapter
19 7 trustee would be very effective in monetizing these assets,
20 correct?

21 A I think I said I didn't believe that the Chapter 7 trustee
22 would be as effective at monetizing the assets as the
23 Reorganized Debtor would be, and me in the role as Claimant
24 Trustee.

25 Q And one of the reasons that you gave is you believe that

Seery - Recross

256

1 the Chapter 7 trustee had to liquidate assets so quickly that
2 it could not be effective; is that correct?

3 A Typically, that's the case, yes.

4 Q You worked for the Lehman trustee, correct?

5 A That's incorrect.

6 Q Okay. Did you work on the Lehman case?

7 A Did I work in the case? No.

8 Q Okay. Did you -- how were you involved within -- within
9 the Lehman case?

10 A It's a long history, but I was a relatively senior person,
11 not senior level, not senior management level person at
12 Lehman. I ran the loan businesses and I helped a number of
13 other places and I -- in the organization. I helped construct
14 the sale of Lehman to Barclays out of the broker-dealer and
15 then helped consummate that sale.

16 Q Okay. I believe, in that case, it was a SIPC -- the
17 trustee was a SIPC trustee, correct?

18 A With respect to the broker-dealer.

19 Q Okay. And you believe that a SIPC trustee is very -- has
20 very similar rules with respect to asset sales; is that
21 correct?

22 A There are some similarities, absolutely.

23 Q Okay. And so in that case, the trustee was in place for
24 seven years, yet you believe -- you want this Court to believe
25 that a Chapter 7 trustee has to liquidate assets in a very

Seery - Recross

257

1 short time frame, is that correct?

2 MR. MORRIS: Objection to the form of the question.

3 THE WITNESS: Yeah, in the Lehman case, --

4 THE COURT: Overruled.

5 THE WITNESS: I'm sorry, Judge.

6 THE COURT: Go ahead.

7 THE WITNESS: In the Lehman case, the SIPC trustee
8 spent years litigating, not liquidating. The broker-dealer
9 was sold in our structured deal to Barclays, and then the SIPC
10 trustee liquidated the remainder of the estate, which was the
11 broker-dealer, but most of it had been sold to Barclays. It
12 was really a litigation case.

13 BY MR. TAYLOR:

14 Q But it did -- that trustee did sell off subsequent assets
15 after the initial sale, correct?

16 A That trustee, I don't think, managed -- I don't know about
17 that. The trustee didn't really manage any assets. Other
18 than litigations.

19 Q You've also testified that you didn't believe or that you
20 would not take on this role without the gatekeeper and
21 injunction -- gatekeeper role and injunction being in place;
22 is that correct?

23 A Yes.

24 Q And you're also familiar with the Barton Doctrine,
25 correct?

Seery - Recross

258

1 A I'm not.

2 Q Okay. Do you believe that a Chapter 7 trustee could be
3 sued by third parties without obtaining either relief from
4 this Court -- let me just stop there. Do you believe that a
5 Chapter 7 trustee could be sued without seeking leave of this
6 Court?

7 A I think it would be difficult. I know that Chapter 7
8 trustees have qualified immunity, so I think, whether it would
9 be leave of this Court or it's just that there's a very high
10 bar to suing them, I'm not exactly sure. It's not something
11 I've spent time on.

12 Q Okay. So a hypothetical Chapter 7 trustee would have no
13 need of the gatekeeper role or injunction if this case were
14 converted to one under Chapter 7, correct?

15 A That's probably true.

16 Q Thank you.

17 MR. TAYLOR: No further questions.

18 THE COURT: All right. Any other recross?

19 MR. DRAPER: Your Honor, I have nothing --

20 THE COURT: All right.

21 MR. DRAPER: -- further.

22 THE COURT: All right. I think we're done, but
23 anyone I've missed?

24 All right. Mr. Seery, it's been a long day. You are
25 excused from the virtual witness stand.

Seery - Recross

259

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: All right. Mr. Morris, let's see if
3 there's anything else we can accomplish today. It's 4:18
4 Central time. Who would be your next witness?

5 MR. MORRIS: My next witness would be John Dubel,
6 Your Honor.

7 THE COURT: All right. Can you give us a time
8 estimate for direct?

9 MR. MORRIS: I wouldn't expect Mr. Dubel to be more
10 than 20 minutes or so, but I would offer the Court, if you
11 think it would be helpful, counsel for the CLO Issuers is on
12 the call, and I believe that they would be prepared to just
13 confirm for Your Honor that there is an agreement in
14 principle, just as Mr. Seery has testified to, and maybe you
15 want to hear from her. I know she's not really a witness, but
16 she might be able to make some representations to give the
17 Court some comfort that everything Mr. Seery has said is true.

18 THE COURT: I think that would be useful. Is it Ms.
19 Anderson or who is it?

20 MS. ANDERSON: That is -- it is, Your Honor. And you
21 know, I appreciate the testimony given. I certainly do not
22 want to testify, but thought it might be useful for the Court
23 to hear from us.

24 Amy Anderson on behalf of the Issuers from Jones Walker.
25 Schulte Roth also represents the Issuers. And I can represent

1 to the Court that the agreement as it's represented on **Docket**
2 **1807**, as more particularly described in Exhibit C, which Your
3 Honor has seen, is the agreement reached between the Issuers
4 and the Debtor.

5 There was some testimony about fees owed, accrued fees
6 owed to the Debtor. I certainly cannot speak to the substance
7 of each particular management agreement with each CLO. They
8 are all distinct and unique and very lengthy documents. I
9 will -- I can represent to the Court that any accrued fees
10 that are owed were not intended to be included in the release.
11 It is -- it is not meant to release fees owed to Highland
12 under the particular management agreements.

13 Of course, if the Court has any questions or if I can
14 provide anything further, I'm happy to. And I will be on the
15 hearing today and tomorrow, but I thought it might be useful,
16 given the topic of the testimony this afternoon.

17 THE COURT: All right. That was useful. Thank you,
18 Ms. Anderson.

19 All right. Well, Mr. Morris, shall we go ahead and hear
20 from Mr. Dubel today, perhaps finish up a second witness?

21 MR. MORRIS: Yeah. I think we have the time. I
22 think Mr. Dubel is here. Are you here, Mr. Dubel?

23 MR. DUBEL: I am. Can you hear me, Your Honor?

24 THE COURT: I can hear you, but I cannot see you.
25 Oh, now I can see you. Please raise your right hand.

Dubel - Direct

261

1 JOHN S. DUBEL, DEBTOR'S WITNESS, SWORN

2 THE COURT: All right. Thank you. Mr. Morris, go
3 ahead.

4 MR. MORRIS: Thank you very much, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. MORRIS:

7 Q Mr. Dubel, can you hear me?

8 A I can, Mr. Morris.

9 Q Okay. Do you have a position today with the Debtor, sir?

10 A I am a director of Strand Advisors, Inc., which is the
11 general partner of the Debtor.

12 Q Okay. And can you --

13 MR. MORRIS: Your Honor, just as a reminder, I'm
14 going to ask Mr. Dubel to describe his professional experience
15 in some detail, to put into context his testimony, but his
16 C.V. can be found at Exhibit 6Y as in yellow on Docket No.
17 1822.

18 THE COURT: All right.

19 BY MR. MORRIS:

20 Q Mr. Dubel, can you describe your professional background?

21 A Yes. I have approximately, almost, and I hate to say it
22 because it's making me feel old, but I have almost 40 years of
23 experience working in the restructuring industry.

24 I have served in many roles in that, both as an advisor,
25 an investor in distressed debt, and also a member of

Dubel - Direct

262

1 management teams, and as a director, both an independent
2 director and a non-independent director.

3 My executive roles have included the -- both an executive
4 director, chief executive officer, president, chief
5 restructuring officer, chief financial officer. And I have
6 been involved in some of the largest Chapter 11 cases over the
7 last several decades, including cases like *WorldCom* and
8 *SunEdison*.

9 Q Let's focus your attention for a moment just on the
10 position of independent director. Have you served in that
11 capacity before this case?

12 A I have.

13 Q Can you describe for the Court some of the cases in which
14 you've served as an independent director?

15 A Sure. I've served as an independent director in several
16 cases that were I'll call post-reorg cases. *Werner Company*,
17 which was the largest climbing equipment manufacturer in the
18 world, manufacturer of ladders, *Werner Ladders*. You'll see
19 them on every pickup truck running around the countryside.

20 *FXI Corporation*, which is a -- one of the largest foam
21 manufacturers. Everybody's probably slept or sat on one of
22 their products.

23 *Barneys New York*, back in 2012, when they did an out-of-
24 court restructuring. I had previously been involved with
25 *Barneys* 15 years before that, and so I was called upon because

Dubel - Direct

263

1 of my knowledge to be an independent director in that
2 situation. Have had no relationship with Barneys since it
3 emerged from Chapter 11 back in 1998.

4 I have been the independent director in *WMC Mortgage*,
5 which was a mortgage company owned by General Electric.

6 And I am currently serving as an independent director in a
7 company -- in two companies. One, *Alpha Media*, which is a
8 large radio station chain that recently filed Chapter 11, I
9 believe it was late Sunday night, and I am also an independent
10 director in the *Purdue Pharma* bankruptcy, and have served
11 prior to the bankruptcy and am the chair of the special
12 independent committee of directors -- special committee of
13 independent directors in that particular situation.

14 Q That sounds like a lot. In terms of other fiduciary
15 capacities, I think your C.V. refers to Leslie Fay. Were you
16 involved in that case, and if so, how?

17 A I was. That was -- for those people who may remember it,
18 that goes back into the 1993 era. *Leslie Fay* was a large
19 apparel manufacturer, and at the time was one of the largest
20 companies that had gone through an extensive fraud. I say at
21 the time because it was about a \$180 million fraud, which
22 pales by some of the ones that have followed it.

23 I was brought in as the executive vice president in charge
24 of restructuring, chief financial officer, and was also added
25 to the board of directors. Even though I wasn't independent,

Dubel - Direct

264

1 I was added to the board of directors to have the fresh face
2 on the board in that particular situation because of the fraud
3 that had taken place.

4 Q And --

5 A Sun --

6 Q Go ahead.

7 A SunEdison, I was brought in as the CEO. Actually,
8 initially, as the chief restructuring officer, with a mandate
9 to replace the CEO, which took place shortly after I was
10 brought on board and -- because of various issues surrounding
11 investigations by the SEC, DOJ, and allegations by the
12 creditors of fraud. And so I was brought in to run the
13 company through its Chapter 11 process.

14 As I'd mentioned earlier, *WorldCom*, I was brought in at
15 the beginning of the case as the fresh chief financial
16 officer. And I think everybody is familiar with what happened
17 in the *WorldCom* situation.

18 Q All right. Based on that experience, do you have a view
19 as to whether the appointment of independent directors is
20 unusual?

21 A It is not. More recently, it has -- it had been in the
22 past. Usually, you know, they would try and take the existing
23 directors and form a special committee of the existing
24 directors. But I think the state of the art has become more
25 where independent directors are brought in, mainly because the

Dubel - Direct

265

1 cases have become a lot more complex in nature, and larger,
2 and the transactions themselves are much more sophisticated.
3 And so having somebody independent has been important for
4 analyzing the various transactions. And also, quite often,
5 it's just bringing a fresh, independent voice to the company
6 on the board.

7 Q Do you have an understanding as to the purpose and the
8 role of independent directors generally in restructuring and
9 bankruptcy cases?

10 A Sure. As I kind of alluded to a little bit earlier, the
11 -- probably the most critical thing is for restoring
12 confidence in the company and in the management in terms of
13 corporate governance, especially when there have been troubled
14 situations, where -- whether it's been fraud or allegations
15 made against the company and its prior management or when
16 management has left under difficult situations.

17 Also, you know, independent thought process being brought
18 to the board is very important for helping guide companies.
19 It's quite often the existing management team or the existing
20 board may get stuck in a rut, as you can say, you know, in
21 terms of their thinking on how to manage it, and having
22 somebody with restructuring experience who provides that
23 independent voice is very important to the operations.

24 In addition, having someone who can look at conflicts that
25 might arise between shareholders or shareholders and the board

Dubel - Direct

266

1 members is important. As I mentioned earlier, the *WMC*
2 *Mortgage* situation was one where I was brought on to -- as an
3 independent member of the board to effectively negotiate an
4 agreement or a settlement between WMC and its parent, General
5 Electric. That entity was being -- WMC was being sued for
6 billions of dollars, and there were issues as to whether or
7 not General Electric should fund those obligations. And so
8 that was a role that is quite often occurring in today's day
9 and age.

10 In addition, evaluating transactions for companies is
11 important, whereby either the shareholders who sit on the
12 board or board members may be involved in those transactions,
13 needing an independent voice to review it. And, you know, I
14 have served in situations. Again, *Barneys New York* and *Alpha*
15 *Media* is another example where, as an independent director, I
16 am one of the parties responsible for evaluating those
17 transactions and making recommendations to the entire board.

18 And then, again, you know, situations where it's just
19 highly-contentious and having, as I said, having that
20 independent view brought to the table is something that is
21 very helpful in these cases.

22 Q I appreciate the fulsomeness of the answer. During the
23 time that you served in these various fiduciary capacities, is
24 it fair to say you spent a lot of time considering and
25 addressing issues relating to D&O and other executive

Dubel - Direct

267

1 liability issues?

2 A It's usually one of the things that you get involved with
3 thinking about prior to taking on the role because you want to
4 make sure that there are the appropriate protections for the
5 director.

6 Q Can you describe for the Court some of the protections
7 that you've sought or that you've seen employed in some of the
8 cases you've worked on, including this one, by the way?

9 A Sure. I mean, one of the first things you look to is does
10 the company -- will the company indemnify the director for
11 serving in that capacity? And if the company will not
12 indemnify, then there's always a question as to why not, and
13 it's probably something you don't want to get involved with.

14 Generally, that is something that I don't think I've ever
15 seen a case where there has not been indemnification.
16 Obviously, it would, you know, cause great pause or concern if
17 they weren't willing to indemnify. But that is important.

18 Providing D&O insurance is very important. And in most
19 situations, you know, over the last 10-15 years, if there's
20 not adequate D&O insurance -- quite often, the D&O insurance
21 has been tapped out because of claims that will -- have been
22 brought or are anticipated to be brought -- new D&O insurance
23 is something that's front and center for the minds of
24 independent directors such as myself.

25 As you -- that gets you into the case and gets you moving.

Dubel - Direct

268

1 As you start to look towards the confirmation and exit from
2 the case, things that would be appropriate, that, you know,
3 would always be something you would want to look at would be
4 exculpation language, releases. And in this particular case,
5 the injunction, or what Mr. Seery earlier referred to as the
6 gatekeeper clause, is something that is very important for
7 directors, both, you know, as they're thinking through it and
8 as they emerge.

9 Q All right. Let's shift now to this case, with that
10 background. How did you learn about this case?

11 A I had a party who was involved in the case reach out to me
12 in early part of December of 2019 to see if I would be
13 interested in getting involved. I think that was about the
14 time -- it was after -- as I recall, it was after the case had
15 been moved to Dallas and when there was a -- consideration of
16 either a Chapter 11 or a Chapter 7 trustee. I can't remember
17 exactly which it was. But there was talk about a motion to
18 bring on a trustee and get rid of all the management and the
19 like and such.

20 Q Can you describe in as much detail as you can recall the
21 facts and circumstances that led to your appointment as an
22 independent director?

23 A Sure. I, as I said, I had -- early December, I had an --
24 one of the parties involved -- had, probably within the next
25 week, probably two or three others -- that reached out to see

Dubel - Direct

269

1 if I would be interested in participating. I met with the
2 Creditors' Committee or -- I'm not sure if it was all the
3 members, but representatives of the Creditors' Committee,
4 along with counsel, and I believe financial advisors were
5 involved. They walked me through the issues. They wanted to
6 hear about my C.V. Quite a few of them knew me, knew me well,
7 but others wanted to hear about my background and how I would
8 look at things as an independent director.

9 That went through into the latter part of December. I
10 knew that they were talking to other parties. I think it was
11 probably right around the first of the year or so that I was
12 informed, maybe a little bit earlier than that, that I was
13 informed that Mr. Seery was one of the other parties that they
14 were talking to, and Mr. Seery and I were put in touch with
15 each other. I had worked with Mr. Seery back probably nine
16 years earlier when I was the CEO of FGIC. He was involved in
17 a matter that we were restructuring, and so knew him a little
18 bit and was comfortable working with him as a, you know,
19 another independent director.

20 Then we took the time that we had to to -- or, I took the
21 time to -- from the beginning, you know, the early part of
22 December, look at the docket, understand what was taking
23 place. I -- in addition, I met with the company and its
24 advisors, in-house counsel, the folks at DSI who were at the
25 time the CRO and the company's counsel to better understand

Dubel - Direct

270

1 some of the issues.

2 Mr. Seery and I, as I said, were both selected, and we
3 went through the process of, I guess, breaking the tie, I
4 think, if I could say it that way, amongst the creditors and
5 the Debtor as to who would be the third member of the board.
6 And we were given the opportunity to go out, interview, and
7 select the third member, which resulted in Russell Nelms'
8 appointment to the board. And also during that time, we were
9 given the opportunity to have some input -- not a hundred
10 percent input, but some input -- on the January 9th order that
11 -- the January 9, 2020 order that was put in place appointing
12 us and giving us some of the protections that we felt were
13 appropriate and necessary in this case.

14 Q All right. We'll get to that in a moment, but during this
15 diligence period, did you form an understanding as to why an
16 independent board was being formed, why it was being sought?

17 A Yes. There was, my words, there was a lot of distrust
18 between the creditors and the management -- not the CRO, but
19 the prior management of the company -- and there had been a
20 motion brought both to obviously bring the case back to Dallas
21 from I think it was originally in Delaware and then there was
22 a motion to seek, you know, to remove management and put in a
23 trustee.

24 There had been a dozen years of litigation with one party,
25 about eight or nine years with another major party, and

Dubel - Direct

271

1 several other of the major creditors were litigants. The
2 other, as I understood, the other creditors, main creditors in
3 the case were all lawyers who had not yet gotten paid for the
4 litigation work that they had done. And so it was obvious
5 that this was a very -- a highly-litigious situation.

6 Q In addition to speaking with the various constituents, did
7 you do any diligence on your own to try to understand the case
8 before you accepted the appointment?

9 A Yes. I went to the docket to look at all the -- not every
10 single thing that had been filed, but to try and look at all
11 the key, relevant items that had been filed, get a better
12 understanding of what was out there. Looked at some of the
13 initial filings of the company in terms of the, you know, the
14 creditors, to understand who the creditor base was per the
15 schedules that had been filed. Looked at the -- some of the
16 various pleadings that had been put in place.

17 Q Did you form a view as to the causes of the bankruptcy
18 filing?

19 A Litigation. That was my clear view. This company had
20 been in litigation with multiple parties, various different
21 parties, since around 2008. Generally, you would see
22 litigation like the types that were, you know, that were here,
23 you know, you'd litigate for a while, then you'd try and
24 settle it.

25 It did not appear to me that there was any intention on

Dubel - Direct

272

1 the -- the Debtor to settle these litigations, but would
2 rather just continue the process and proceed forward on the
3 litigation until the very last minute. And so it was obvious
4 that this was going to -- that the Debtor was a, as I said, a
5 highly-litigious shop, and that was one of the causes,
6 obviously, the cause of the filing, along with the fact that
7 judgments were about to be entered against the Debtor.

8 Q All right. And in January 2020, do you recall that's when
9 the agreement was reached between the Debtor, the Committee,
10 and Mr. Dondero?

11 A Yeah, it was the first week or so, which resulted in a
12 hearing on I believe it was January 9th in front of Judge
13 Jernigan.

14 Q And as a part of that -- I think you testified at that
15 hearing. Do I have that right?

16 A I don't recall if I did. I might have. I might have
17 testified at a subsequent hearing. But --

18 Q But was --

19 A -- I was in the courtroom for that hearing, yes.

20 Q Was it part of that process by which you accepted the
21 appointment as independent director?

22 A I accepted it based upon the order that had been
23 negotiated amongst the parties, the creditors, the Debtor, Mr.
24 Dondero, and others. And that was the key thing that was --
25 and approved by the Court on that date. And that was key for

Dubel - Direct

273

1 my acceptance of the role as an independent director.

2 Q And did you and the other prospective independent
3 directors participate in the negotiation of the substance of
4 the agreement?

5 A We did. We didn't have a hundred percent say over it, but
6 we were able to get our voices heard. As Mr. Seery testified
7 earlier, he was instrumental in coming up with an idea about
8 how to put in place the injunction, you know, the -- I think
9 he referred to it as the gatekeeper injunction, which was
10 obviously in this case very critical to all three of us: Mr.
11 Seery, Mr. Nelms, and myself.

12 Q Can you describe for the Court kind of the issues of
13 concern to you and the other prospective board members? What
14 was it that you were focused on in terms of the negotiations?

15 A Well, obviously, indemnification was important, but that
16 was something that was going to be granted. Having the right
17 to obtain separate D&O insurance just for the three directors
18 was important. We were concerned that Strand Advisors, Inc.
19 really had no assets, and so we wanted to make sure that the
20 Debtor was going to get -- was going to basically guarantee
21 the indemnification.

22 The -- because of the litigious nature and what we had
23 heard from all of the various parties involved, including
24 people inside the Debtor who we had talked with, that it would
25 be something that was important for us to make sure that the

Dubel - Direct

274

1 injunction, the gatekeeper injunction was put in place.

2 Q And can you elaborate a little bit on I think you said you
3 had done some diligence and you had formed a view as to the
4 causes of the bankruptcy filing, but did this case present any
5 specific concerns or issues that you and the board members had
6 to address perhaps above and beyond what you experienced in
7 some of the other cases you described?

8 A Well, as I said earlier, the fact that the litigation --
9 the various litigations with the creditors have been going on
10 for what I viewed as an inordinate amount of years, and that
11 it was clear from my diligence that I had done that this had
12 been directed by Mr. Dondero, to keep this moving forward in
13 the litigation, and to, in essence, just, you know, never give
14 up on the litigation.

15 It was important that the types of protections that we
16 were afforded in the January 9th order were put in place,
17 because we -- none of us -- none of the three of us, and
18 myself in particular, did not want to be in a position where
19 we would be sued and harassed through lawsuits for the next,
20 you know, ten years or so. That's not something anybody would
21 want to sign up for.

22 Q All right. Let's look at the January 9th order and the
23 specific provisions I think that you're alluding to.

24 MR. MORRIS: Can we call up Exhibit 5Q, please?

25 THE WITNESS: Pardon me while I put my glasses on to

Dubel - Direct

275

1 read this.

2 MR. MORRIS: All right. And if we can go to
3 Paragraph 4.

4 BY MR. MORRIS:

5 Q Is that the paragraph, sir, that was intended to address
6 the concern that you just articulated about Strand not having
7 any assets of its own?

8 A Yes, it is.

9 Q And can you just describe for the Court how that
10 particular provision addressed that concern?

11 A Sure. Since we were directors of Strand, which is the
12 general partner of the Debtor, we felt it was important that
13 the general -- that Highland, the Debtor, would provide the
14 guaranty on indemnification, because Highland had the assets
15 to back up the indemnification.

16 It was also pretty clear, from my experience in having
17 placed D&O insurance, you know, over the last 25-30 years,
18 that if there was no, you know, opportunity for
19 indemnification, putting in place insurance would be very
20 difficult or exorbitantly expensive. So having this
21 indemnification by Highland was a very important piece of the
22 order that we were seeking.

23 Q And the next piece is the insurance piece in Paragraph 5.
24 Do you see that?

25 A I do.

Dubel - Direct

276

1 Q Did you have any involvement in the Debtor's efforts to
2 obtain D&O insurance for the independent board?

3 A I did.

4 Q Can you just describe for the Court what role you played
5 and what issues came up as the Debtor sought to obtain that
6 insurance?

7 A Sure. The Debtors had been looking to get an insurance
8 policy in place. They were not able to do that. I happen to
9 have worked with an insurance broker on D&O situations in some
10 very difficult situations over the years and brought them into
11 the mix. They were able to go out to the market and find a
12 policy that would cover us, the -- kind of the key components
13 of that policy, though, were, number one, the guaranty that
14 HCMLP would give -- I'm sorry, the guaranty that HCMLP would
15 give to Strand's obligations, and also the -- I'll call it the
16 gatekeeper provision was very important because these parties
17 did not want to have -- they wanted to have what was referred
18 to, commonly referred to as the Dondero Exclusion.

19 So while we were -- we purchased a policy that covered us,
20 it did have an exclusion, unless there were no assets left,
21 and then the what I'll call -- we refer to as kind of a Side A
22 policy would kick in.

23 Q Okay. What do you mean by the Dondero Exclusion?

24 A The insurers did not want to cover the -- any litigation
25 that Mr. Dondero would bring against directors. It was pretty

Dubel - Direct

277

1 commonly known in the marketplace that Mr. Dondero was very
2 litigious, and insurers were not willing to write the
3 insurance without the protections that this order afforded
4 because they did not want to be hit with frivolous -- hit with
5 claims on the policy for frivolous litigation that might be
6 brought.

7 MR. TAYLOR: Your Honor, this is Mr. Taylor. I've
8 got to object to the last answer. He testified as to what the
9 insurers' belief was and what they would or would not do based
10 upon their own knowledge. It's not within his personal
11 knowledge. And therefore we'd move to strike.

12 THE COURT: I overrule that objection.

13 MR. MORRIS: Your Honor?

14 THE COURT: I overrule the objection.

15 MR. MORRIS: Thank you. Thank you, Your Honor.

16 BY MR. MORRIS:

17 Q Mr. Dubel, can you explain to the Court, in your work in
18 trying to secure the D&O insurance, what rule the gatekeeper
19 provision played in the Debtor's ability to get that?

20 A Based upon my discussions with the insurance broker, who I
21 have worked with for 25-plus years, had that gatekeeper
22 provision not been put in place, we would not have been able
23 to get insurance.

24 Q All right. Let's look at the gatekeeper provision.

25 MR. MORRIS: Can we go down to Paragraph 10, please?

Dubel - Direct

278

1 Perfect. Right there.

2 BY MR. MORRIS:

3 Q Is this gatekeeper provision, is this also the source of
4 the exculpation that you referred to?

5 A Yes.

6 Q And what's your understanding of how the exculpation and
7 gatekeeper functions together?

8 A Well, my apologies, I'm not an attorney, so just from a
9 business point of view, the way I look at this is that, you
10 know, obviously, we're -- you know, the directors are not
11 protected from willful misconduct or gross negligence, but any
12 negligence -- you know, claims brought under negligence and
13 the likes of such, and things that might be considered
14 frivolous, would have to first go to Your Honor in the
15 Bankruptcy Court for a review to determine if they were claims
16 that should be entitled to be brought.

17 Q If you take a look at the provision, right, do you
18 understand that nobody can bring a claim without -- in little
19 i, it says, first determining -- without the Court first
20 determining, after notice, that such claim or cause of action
21 represents a colorable claim of willful misconduct or gross
22 negligence against an indirect -- independent director. Do
23 you see that?

24 A I do.

25 Q Is it your understanding that parties can only bring

Dubel - Direct

279

1 claims for gross negligence or willful misconduct if the Court
2 makes a determination that there is a colorable claim?

3 A That's my understanding.

4 Q And the second --

5 A I think they have the right -- I think they have the right
6 to go to the Court to ask if they can bring the claim, but the
7 Court has to make the determination that it's a colorable
8 claim for willful misconduct or gross negligence.

9 Q And if the Court -- is it your understanding that if the
10 Court doesn't find that there is a colorable claim of willful
11 misconduct or gross negligence, then the claim can't be
12 brought against the independent directors?

13 A That is my understanding, yes.

14 Q And was -- taken together, Paragraphs 4, 5, and 10, were
15 they of importance to you and the other independent directors
16 before accepting the position?

17 A They were absolutely critical to me and definitely
18 critical to the other directors, because we all negotiated
19 that together, and it would -- I don't -- I don't think any of
20 the three of us would have taken on this role if those
21 paragraphs had not been included in the order.

22 Q Okay. Just speaking for yourself personally, is there any
23 chance you would have accepted the appointment without all
24 three of those provisions?

25 A I would not have.

Dubel - Direct

280

1 Q And why is that? In this particular case, why did you
2 personally believe that you needed all three of those
3 provisions?

4 A Well, you know, people like myself, you know, someone
5 who's coming in as an independent director, come in in a
6 fiduciary capacity. And, you know, we take on risks. Now,
7 granted, in a Chapter 11 case, as the saying goes, you know,
8 it's a lot safer because everything has to be approved by the
9 Court, but there are still opportunities for parties to, in
10 essence, have mischief going on and bring nuisance lawsuits
11 that would take a lot of time and effort away from either the
12 role of our job of restructuring the entity or post-
13 restructuring, would just be nuisance things that would cost
14 us money. And we, you know, I did not want to be involved in
15 that situation, knowing the litigious nature of Mr. Dondero
16 from the research that I had done, you know, the diligence
17 that I had done. I did not want to subject myself to that.
18 And it has proven an appropriate and very solid order because
19 of the conduct of Mr. Dondero, as Mr. Seery has testified to
20 earlier.

21 Q Do you have a view as to what the likely effect would be
22 on future corporate restructurings if you and your fellow
23 directors weren't able to obtain the type of protection
24 afforded in the January 9th order?

25 A I think it would be very difficult to find qualified

Dubel - Direct

281

1 people who would be willing to serve in these types of
2 positions if they knew they had a target on their backs. You
3 know, it was something that was clear to us, to Mr. Seery, Mr.
4 Nelms, myself at the time, that if we had a target -- we felt
5 like we would have a target on our back if we didn't have
6 these protections.

7 It just wasn't worth the risk, the stress, the
8 uncertainty, the potential cost to us. And so I don't think
9 anybody else would be, you know, willing to take on the roles
10 as an independent director with the facts and circumstances
11 and the players involved in this particular case.

12 MR. MORRIS: I have no further questions, Your Honor.

13 THE COURT: All right. Pass the witness. Let's see.
14 You went -- I'm going to give a time. You went 32 minutes.
15 So, for cross of this witness, I'm going to limit it to an
16 aggregate of 32 minutes. Who wants to go first?

17 MR. DRAPER: Your Honor, this is Douglas Draper.
18 I'll be happy to go first.

19 THE COURT: All right.

20 CROSS-EXAMINATION

21 BY MR. DRAPER:

22 Q Mr. Dubel, prior to your engagement, did you happen to
23 read the case of *Pacific Lumber*?

24 A I did not.

25 Q And were you advised about *Pacific Lumber* by somebody

Dubel - Cross

282

1 other than a -- your lawyer?

2 A I'm not familiar with the case at all, Mr. Draper.

3 Q Are you aware, and you've been around a long time, that
4 different circuits have different rules for liabilities of
5 officers, directors, and people like that?

6 A I am aware that there are different, I don't know what the
7 right term is, but precedents, I guess, in different circuits
8 for any number of things, whether it's a sale motion or
9 protections of officers and directors or anything. So each
10 circuit has its own unique situations.

11 Q And one last question. On a go-forward, after -- if this
12 plan is confirmed and on the effective date, you will not have
13 any role whatsoever as an officer or director of the new
14 general partner, correct?

15 A I have not been asked to. As Mr. Seery testified, he may
16 ask for assistance or just -- in most situations that I'm
17 involved with, I may have a continuing role just as a -- I'll
18 call it an advisor or somebody to provide a history. But at
19 this point in time, I have not been asked to have any
20 involvement.

21 Q And based on your experience, you know that there's a
22 different liability for a director and an officer versus
23 somebody who is an advisor?

24 MR. MORRIS: Objection to the form of the question.
25 No foundation.

Dubel - Cross

283

1 THE COURT: Overruled.

2 MR. DRAPER: Mr. Dubel has shown --

3 THE COURT: Mr. Dubel, you can answer if you know.

4 MR. DRAPER: Mr. Dubel, you can answer.

5 THE WITNESS: I'm sorry, Your Honor, I didn't hear
6 you say overruled. Thank you.

7 Mr. Draper, I apologize, could you repeat the question?

8 BY MR. DRAPER:

9 Q The question is you know from your experience that there's
10 a different liability for somebody who is an officer or
11 director versus somebody who's an advisor?

12 A Yes, that's my experience, which is why in several
13 situations post-reorganization, while I have not been involved
14 *per se*, and I use the term involved meaning, you know, on a
15 day-to-day basis, if someone asks me to assist, I'll usually
16 ask them to bring me in as a non -- an unpaid employee or a,
17 you know, a nominally-amount-paid employee, so that I would be
18 protected by whatever protections the company might provide.

19 MR. DRAPER: I have nothing further for this witness,
20 Your Honor.

21 THE COURT: All right. Other cross?

22 MR. TAYLOR: Yes, Your Honor.

23 MR. RUKAVINA: Yes, Your Honor.

24 MR. TAYLOR: Oh, go ahead, Davor.

25 MR. RUKAVINA: No, Clay, go ahead.

Dubel - Cross

284

1 CROSS-EXAMINATION

2 BY MR. TAYLOR:

3 Q Mr. Dubel, this is Clay Taylor here on behalf on Mr.
4 Dondero. I believe you had previously testified in response
5 to questions from Mr. Morris that Mr. Dondero had engaged in a
6 pattern of litigious behavior; is that correct?

7 A I believe that's the testimony I gave, yes.

8 Q Okay. And please give me the specific examples of which
9 cases you believe he has engaged in overly-litigious behavior.

10 A Well, all of the cases that resulted in creditors, large
11 creditors in our bankruptcy. That would be the UBS situation,
12 the Crusader situation which became the Redeemer Committee,
13 litigation with Mr. Daugherty, with Acis and Mr. Terry. And
14 as I mentioned earlier, I'd, you know, been informed by
15 members of the management team that it was Mr. Dondero's style
16 to just litigate until the very end to try and grind people
17 down.

18 Q Okay. Was Mr. Dondero or a Highland entity the plaintiff
19 in the UBS case?

20 A No, but what was referred -- what I was referring to was
21 the nature in which he defended it and went overboard and
22 refused to ever, you know, try and settle things in a manner
23 that would have gotten things done. And just looking at,
24 having been involved in the restructuring industry for the
25 last 40 years, as I said, almost 40 years, and been involved

Dubel - Cross

285

1 in many, many litigious situations, it's obvious when someone
2 is litigious, whether they're the plaintiff or the defendant.

3 Q So are you personally familiar with the settlement
4 negotiations in the UBS case that happened pre-bankruptcy,
5 then?

6 A I have been informed that there were settlement
7 negotiations, and subsequently determined, through discussions
8 with the parties, that they weren't really close to -- to a
9 settlement.

10 Q But are you aware of --

11 A Mr. Dondero might have thought they were, but they were
12 not.

13 Q Okay. Would you be surprised to learn if UBS had offered
14 to settle pre-bankruptcy for \$7 million?

15 A As I understand, settlements -- settlement offers pre-
16 bankruptcy had a tremendous number of -- I don't know what the
17 right term is -- things tied to it and that clearly were never
18 going to get done.

19 Q Okay. When you say things were tied to it, what things
20 were tied to it?

21 A I don't know all of the settlement discussions that took
22 place, but what I was informed was that there were a lot of
23 conditions that were included in that. And it's -- if it had
24 been an offer of \$7 million and Mr. Dondero didn't settle for
25 that, there must have been a reason why. So, you know, since

Dubel - Cross

286

1 the entities -- all of the entities within the Highland
2 Capital empire, if you'd call it that, were being sued for
3 almost a billion dollars.

4 Q Okay. And you say there was lots of conditions that were
5 tied to that. What were the conditions?

6 A As I said earlier, I wasn't informed of them on all the
7 prepetition settlements. That's just what I was told, there
8 was conditions.

9 Q Okay. And who were you told these things by?

10 A Both external counsel and internal counsel. Mr.
11 Ellington, Scott Ellington, and Isaac -- the litigation
12 counsel.

13 Q Okay. So --

14 A That's -- sorry.

15 Q Okay. In each of these cases, you were informed by your
16 views by statements that were made to you by other people?

17 A Yes.

18 Q Okay.

19 A Made -- and particularly made by members of management of
20 the Debtor, which is pretty informed.

21 Q Okay. Which members of management were those?

22 A As I just testified, it was Mr. Ellington, who was the
23 general -- the Debtor's general counsel, and Mr. Leventon,
24 Isaac Leventon, who was the -- I believe his title was
25 associate general counsel in charge of litigation.

Dubel - Cross

287

1 Q Okay. Thank you.

2 MR. TAYLOR: No further questions.

3 THE COURT: All right. Mr. Rukavina?

4 CROSS-EXAMINATION

5 BY MR. RUKAVINA:

6 Q Mr. Dubel, we've never met, although I think we were on
7 the phone once together. I know you're a director, so you're
8 at the top, but having been in this case for more than a year,
9 you probably have some understanding of the assets that the
10 Debtor has, don't you?

11 A I do, but I'm not as facile with it as Mr. Seery,
12 obviously.

13 Q Sure. Is it true, to your understanding, that the Debtor
14 owns various equity interests in third-party companies?

15 A Either directly or indirectly. That's my understanding,
16 yes.

17 Q Okay. Have you heard of an entity called Highland Select
18 Equity Fund, LP?

19 A I have.

20 Q And is that a publicly-traded company?

21 A I'm not familiar with its nature there, no.

22 Q Do you know how much of the equity of that entity the
23 Debtor owns?

24 A I don't know off the top of my head, no.

25 Q And again, these may be unfair questions because you're at

Dubel - Cross

288

1 the top, so I'm not trying to make you look foolish. I'm just
2 trying to see. Let me ask one more. Have you heard of
3 Wright, W-R-I-G-H-T, Limited?

4 MR. MORRIS: Objection, Your Honor. Beyond the
5 scope.

6 MR. RUKAVINA: Your Honor, I can recall him on my
7 direct, then.

8 THE COURT: Yeah. I'll --

9 MR. RUKAVINA: But I'd just rather get it over with.

10 THE COURT: I'll allow it.

11 MR. MORRIS: All right. If we're going to get rid of
12 --

13 THE COURT: Overruled.

14 MR. MORRIS: No, that's fine.

15 BY MR. RUKAVINA:

16 Q Have you heard of Wright, W-R-I-G-H-T, Limited?

17 A I think I have, but I just don't recall it, Mr. Rukavina.
18 I'm sorry, Rukavina. Sorry.

19 Q It's okay. It's a --

20 A I'm looking at your chart here, at your name here, and it
21 looks like Drukavina, so I really apologize.

22 Q Believe it or not, it's actually a very famous name in
23 Croatia, although it means nothing here.

24 So, all of the entities that the Debtor owns equity in, I
25 guess you probably, just because, again, you're not in the

Dubel - Cross

289

1 weeds, you can't tell us how much of that equity the Debtor
2 owns, can you?

3 A I can't individually, no. You know, Mr. Seery is our CEO
4 and he's responsible for the day-to-day, you know, issues. So
5 usually we look at it more on a consolidated basis and not in
6 the, you know, down in the weeds, as you refer to it, unless
7 something specific came up.

8 Q Well, would you remember whether, when Mr. Seery or the
9 prior CRO would provide you, as the board member, financial
10 reports, whether that included P&Ls and balance sheets and
11 financial reports for the entities that the Debtor owned
12 interests in?

13 A We might -- we would have seen certain consolidating
14 reports that might -- that would be, you know, consolidating
15 financial statements that would be P&Ls. Where we didn't
16 consolidate them, I'm not sure we saw the actual individual-
17 entity P&Ls on a regular basis. We might have seen them if
18 there was a transaction taking place. But again, you know, I
19 don't have -- I don't remember every single one of them, no.

20 Q And you would agree with me, sir, that the Pachulski law
21 firm is an excellent restructuring, reorganization, insolvency
22 law firm, wouldn't you?

23 A Yes, I would agree with you there.

24 Q Okay. And you would expect them to ensure that anything
25 that has to be filed with Her Honor is timely filed, wouldn't

Dubel - Cross

290

1 you?

2 A I would expect that they would follow the rules.

3 Q Okay. And you have the utmost of confidence, I take it,
4 in your CRO, don't you?

5 A I have a tremendous amount of confidence in our CEO, who
6 also happens to hold the title of CRO, yes, if that's what
7 you're referring to as, Mr. Seery.

8 (Interruption.)

9 MR. RUKAVINA: John.

10 BY MR. RUKAVINA:

11 Q Okay, I think -- yeah, I think I heard that you have
12 tremendous confidence in the CEO, who happens to be the CRO,
13 right?

14 A Yes, that's the case.

15 MR. RUKAVINA: Thank you, Your Honor. I'll pass the
16 witness.

17 THE COURT: All right. Any other cross of Mr. Dubel?

18 All right. Mr. Morris, redirect?

19 MR. MORRIS: Yeah, just very briefly, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. MORRIS:

22 Q You were asked about that *Pacific Lumber* case, Mr. Dubel;
23 do you remember that?

24 A I do remember being asked about it.

25 Q And you weren't familiar with that case, right?

Dubel - Redirect

291

1 A I'm not familiar with the name of the case, no.

2 Q But you did know that the exculpation and gatekeeping
3 provisions were going to be included in the order; is that
4 fair?

5 A I did.

6 Q And did you testify that you wouldn't have accepted the
7 position without it?

8 A I did testify that way.

9 Q And if you knew that you couldn't get those provisions in
10 the Fifth Circuit, would you ever accept a position as an
11 independent director in the Fifth Circuit on a go-forward
12 basis?

13 A Not in a situation such as this, no.

14 Q Okay. Okay.

15 MR. MORRIS: No further questions, Your Honor.

16 THE COURT: All right. Any recross on that narrow
17 redirect?

18 All right. Well, Mr. Dubel, you are excused from the
19 virtual witness stand.

20 THE WITNESS: Thank you, Your Honor.

21 THE COURT: All right. I want to go ahead and --

22 MR. DUBEL: Do you mind if I turn my video off?

23 THE COURT: I'm sorry, what?

24 MR. DUBEL: I said, do you mind if I turn my video
25 off?

1 THE COURT: No, you may. That's fine.

2 MR. DUBEL: Thank you, Your Honor.

3 THE COURT: All right. I want to break now, unless
4 there's any quick housekeeping matter. Anything?

5 MR. MORRIS: No, Your Honor, but I would just ask
6 all parties to let me know by email if they have any
7 objections to any of the exhibits on the witness list that was
8 filed at **Docket No. 1877**, because I want to begin tomorrow by
9 putting into evidence the balance of our exhibits.

10 MR. RUKAVINA: And Your Honor, I was responsible for
11 this due to an internal mistake. The only ones I have an
12 objection to are -- is that 7? John, is that 7, right, 700 --

13 MR. MORRIS: Yes.

14 MR. RUKAVINA: Your Honor, I only have an objection
15 to 70 and 7P, although I think -- think the Court has already
16 admitted 7P, so my objection is moot.

17 THE COURT: I have.

18 MR. RUKAVINA: Okay.

19 THE COURT: So, what --

20 MR. RUKAVINA: Then it would just be --

21 THE COURT: Go ahead.

22 MR. RUKAVINA: I'm sorry. It would just be 70.
23 Septuple O or whatever the word is.

24 THE COURT: All right. So I will go ahead and admit
25 7F through 7Q, with the exception of 7O. Again, these appear

1 at Docket Entry 1877. And Mr. Morris, you can try to get in
2 70 the old-fashioned way if you want to.

3 MR. MORRIS: Yeah, I'll deal with 70 and the very
4 limited number of other objections at the beginning of
5 tomorrow's hearing.

6 THE COURT: All right.

7 (Debtor's Exhibits 7F through 7Q, with the exception of
8 70, are received into evidence.)

9 THE COURT: So we will reconvene at 9:30 Central time
10 tomorrow. I think we're going to hear from the Aon, the D&O
11 broker, Mr. Tauber; is that correct?

12 MR. MORRIS: That's right. And that should be
13 shorter than even Mr. Dubel.

14 THE COURT: All right. Well, we will see you at 9:30
15 in the morning. We are in recess.

16 MR. MORRIS: Thank you so much.

17 THE CLERK: All rise.

18 (Proceedings concluded at 5:09 p.m.)

19 --oOo--

20 CERTIFICATE

21 I certify that the foregoing is a correct transcript from
22 the electronic sound recording of the proceedings in the
above-entitled matter.

23 **/s/ Kathy Rehling**

02/04/2021

24

Kathy Rehling, CETD-444
Certified Electronic Court Transcriber

Date

25

294

INDEX

1		
2	PROCEEDINGS	5
3	OPENING STATEMENTS	
4	- By Mr. Pomerantz	12
	- By Mr. Kathman	29
5	- By Mr. Clemente	33
	- By Mr. Draper	40
6	- By Mr. Rukavina	42
	- By Mr. Taylor	44
7	- By Mr. Kathman	49
	- By Ms. Drawhorn	50
8		
9	WITNESSES	
10	<u>Debtor's Witnesses</u>	
11	James P. Seery	
	- Direct Examination by Mr. Morris	58
12	- Cross-Examination by Mr. Rukavina	169
	- Cross-Examination by Mr. Taylor	212
13	- Cross-Examination by Mr. Draper	233
	- Redirect Examination by Mr. Morris	236
14	- Recross-Examination by Mr. Rukavina	249
	- Recross-Examination by Mr. Taylor	255
15		
	John S. Dubel	
16	- Direct Examination by Mr. Morris	261
	- Cross-Examination by Mr. Draper	281
17	- Cross-Examination by Mr. Taylor	284
	- Cross-Examination by Mr. Rukavina	287
18	- Redirect Examination by Mr. Morris	290
19		
	EXHIBITS	
20	Debtor's Docket 1822 Exhibits	Received 55
21	(exclusive of Exhibits B, D, E, 4D, 4E, 4G, 5T, 6R, 6S, 6T, and 6U)	
22	Debtor's Docket 1866 Exhibits	Received 56
	Debtors' Exhibits 7F through 7Q (exclusive of Exhibit 7O)	Received 293
23		
	Debtor's Exhibit 7P	Received 140
24	Debtor's Exhibit 7Q	Received 75
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX
Page 2

RULINGS

Confirmation Hearing [1808] - *Continued to 2/3/2021* 293

Agreed Motion to (1) Assume Non-Residential Real Property Lease with Crescent TC Investors, LP upon Confirmation of Plan and (II) Extend Assumption Deadline [1624] - *Continued to 2/3/2021* 293

END OF PROCEEDINGS 293

INDEX 294-295

EXHIBIT 207

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
) Chapter 11
)
HIGHLAND CAPITAL) Dallas, Texas
MANAGEMENT, L.P.,) Wednesday, February 3, 2021
) 9:30 a.m. Docket
Debtor.)
) CONFIRMATION HEARING [1808]
) AGREED MOTION TO ASSUME [1624]
)
) *Continued from 02/02/2021*
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

For the Debtors: Ira D. Kharasch
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Official Committee of Unsecured Creditors: Matthew A. Clemente
SIDLEY AUSTIN, LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7539

1 APPEARANCES, cont'd.:

2 For James Dondero: Clay M. Taylor
3 BONDS ELLIS EPPICH SCHAFFER
4 JONES, LLP
420 Throckmorton Street,
5 Suite 1000
Fort Worth, TX 76102
(817) 405-6900

6 For Get Good Trust and Douglas S. Draper
7 Dugaboy Investment Trust: HELLER, DRAPER & HORN, LLC
650 Poydras Street, Suite 2500
8 New Orleans, LA 70130
(504) 299-3300

9 For Certain Funds and Davor Rukavina
10 Advisors: Julian Vasek
MUNSCH, HARDT, KOPF & HARR
11 500 N. Akard Street, Suite 3800
Dallas, TX 75201-6659
12 (214) 855-7587

13 For the NexPoint Lauren K. Drawhorn
Parties: WICK PHILLIPS
3131 McKinney Avenue, Suite 100
14 Dallas, TX 75204
(214) 692-6200

15 For the U.S. Trustee: Lisa L. Lambert
16 OFFICE OF THE UNITED STATES
TRUSTEE
17 1100 Commerce Street, Room 976
Dallas, TX 75242
18 (214) 767-8967

19 For Scott Ellington, Debra A. Dandeneau
20 Isaac Leventon, Thomas BAKER & MCKENZIE, LLP
Surgent, and Frank 452 Fifth Avenue
21 Waterhouse: New York, NY 10018
(212) 626-4875

22 For Certain Funds and A. Lee Hogewood, III
23 Advisors: K&L GATES, LLP
4350 Lassiter at North Hills
24 Avenue, Suite 300
Raleigh, NC 27609
25 (919) 743-7306

Recorded by: Michael F. Edmond, Sr.
UNITED STATES BANKRUPTCY COURT
1100 Commerce Street, 12th Floor
Dallas, TX 75242
(214) 753-2062

Transcribed by: Kathy Rehling
311 Paradise Cove
Shady Shores, TX 76208
(972) 786-3063

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 DALLAS, TEXAS - FEBRUARY 3, 2021 - 9:38 A.M.

2 THE CLERK: All rise. The United States Bankruptcy
3 Court for the Northern District of Texas, Dallas Division, is
4 now in session, the Honorable Stacey Jernigan presiding.

5 THE COURT: Good morning. Please be seated. All
6 right. We are ready for Day Two of the confirmation hearing
7 in Highland Capital Management, LP, Case No. 19-34054. I'll
8 just make sure we've got the key parties at the moment. Do we
9 have Mr. Pomerantz, Mr. Morris, for the Debtor team?

10 MR. POMERANTZ: Yes. Good morning, Your Honor. Jeff
11 Pomerantz for the Debtors.

12 MR. MORRIS: And I'm here as well, Your Honor.

13 THE COURT: All right. Good.

14 All right. For our objecting parties, do we have Mr.
15 Taylor and your crew for Mr. Dondero?

16 MR. TAYLOR: Yes, Your Honor.

17 THE COURT: Good morning.

18 All right. For Dugaboy Trust and Get Good Trust, do we
19 have Mr. Draper? (No response.) All right. I do see Mr.
20 Draper. I didn't hear an appearance. You must be on mute.

21 MR. DRAPER: I'm present, --

22 THE COURT: Okay.

23 MR. DRAPER: -- Your Honor.

24 THE COURT: Okay. Good morning.

25 MR. DRAPER: I'm present, Your Honor.

1 THE COURT: Good morning. I heard you that time.
2 Thank you.

3 All right. And now for what I'll call the Funds and
4 Advisors Objectors, do we have Ms. Rukavina present?

5 MR. RUKAVINA: Yes, Your Honor. Good morning.

6 THE COURT: Good morning. All right. And I will
7 check. Do we have Mr. Clemente or your team there?

8 MR. CLEMENTE: Yes. Good morning, Your Honor. Matt
9 Clemente from Sidley Austin on behalf of the Committee.

10 THE COURT: All right. Ms. Drawhorn, do we have you
11 there for the NexPoint Real Estate Partners and related funds?

12 MS. DRAWHORN: Yes, Your Honor. Good morning.

13 THE COURT: Good morning. All right. Did I miss --
14 I think that captured all of our Objectors. Anyone who I've
15 missed?

16 All right. Well, when we recessed yesterday, Mr. Morris,
17 I think you were about to call your third witness; is that
18 correct?

19 MR. MORRIS: It is, Your Honor. But if I may, I'd
20 like to just address the objections to the remaining exhibits,
21 since I hope that won't take too long.

22 THE COURT: All right. You may.

23 MR. POMERANTZ: Actually, Your Honor, before we go
24 there, we filed the supplemental declaration of Patrick
25 Leatham, as we indicated we would do yesterday. We just

1 wanted to get confirmation again that nobody intends to cross-
2 examine him, so that he doesn't have to sit through the
3 festivities today.

4 THE COURT: All right. Well, I did see that you
5 filed that.

6 Does anyone anticipate wanting to cross-examine Mr.
7 Leatham, the balloting agent?

8 MR. RUKAVINA: Your Honor, I take it that that
9 declaration is part of the record. As long as the Court
10 confirms that, I do not intend to call the gentlemen.

11 THE COURT: All right. Well, I will take judicial
12 notice of it and make it part of the record. It appears at
13 Docket Entry No. 1887. Again, it was filed -- well, it was
14 actually filed early this morning, I think. So, all right.
15 So, with --

16 MR. MORRIS: And to avoid --

17 THE COURT: Go ahead.

18 MR. MORRIS: To -- I was just going to say, to avoid
19 any ambiguity, Your Honor, the Debtor respectfully moves that
20 document into the evidentiary record.

21 THE COURT: All right. The Court will --

22 (Interruption.)

23 THE COURT: Someone needs to put their phone on mute,
24 perhaps. Unless someone was intentionally speaking.

25 All right. So, I will grant that request. Docket Entry

1 No. 1887 will be part of the confirmation evidence of this
2 hearing.

3 (Debtor's Patrick Leatham Declaration at Docket 1887 is
4 received into evidence.)

5 THE COURT: All right. Anything else? There were
6 other exhibits I think you were going to talk about?

7 MR. MORRIS: Yeah. Let me just go through them one
8 at a time, if I may, Your Honor.

9 THE COURT: Okay.

10 MR. MORRIS: All right. So, I'm going to deal with
11 the transcripts that have been objected to one at a time. And
12 I'll just take them in order. The first one can be found at
13 Exhibit B. It is on Docket No. 1822.

14 THE COURT: Okay.

15 MR. MORRIS: Exhibit B is the deposition transcript
16 from the December 16, 2020 hearing on the Advisor and the
17 Funds' motion for an order restricting the Debtor from
18 engaging in certain CLO-related transactions.

19 During that hearing, the Court heard the testimony of
20 Dustin Norris. Mr. Norris is an executive vice president for
21 each of the Funds and each of the Advisors.

22 We would be offering the transcript for the limited
23 purposes of establishing Mr. Dondero's ownership and control
24 over the Advisors.

25 Mr. Norris also gave some pretty substantial testimony

1 concerning the so-called independent board of the Funds.

2 And as a general matter, Your Honor, to the extent that
3 the objection is on hearsay grounds, the transcript -- at
4 least the portions relating to Mr. Norris's testimony --
5 simply are not hearsay under Evidentiary Rule 801(d)(2).
6 These are statements of an opposing party, and I think we fall
7 well within that.

8 So, we would respectfully request that the Court admit
9 into the record the transcript from December 16th, at least
10 the portions of which are Mr. Norris's testimony.

11 THE COURT: All right. And, again, these appear at
12 -- I think I heard you say B and then E. Is that correct?

13 MR. MORRIS: Just B. Just B at the moment. B as in
14 boy.

15 THE COURT: Okay. Just B at the moment?

16 All right. Any objections to that?

17 MR. RUKAVINA: Your Honor, I had objected, but now
18 that it's offered for that limited purpose, I withdraw my
19 objection.

20 THE COURT: All right. Then B -- I'm sorry. Was
21 there anyone else speaking?

22 B will be admitted. And, again, it appears at Docket
23 Entry 1822.

24 (Debtor's Exhibit B, Docket Entry 1822, is received into
25 evidence.)

1 MR. MORRIS: Okay. Next, the next transcript can be
2 found at Exhibit 6R, and that's Docket 1866. Exhibit 6R is
3 the transcript of the January 9, 2020 hearing where the Court
4 approved the corporate governance settlement. We think that
5 that transcript is highly relevant, Your Honor, because it
6 reflects not only Mr. Dondero's notice and active
7 participation in the consummation of the corporate governance
8 agreement, but it also reflects the Court and the parties'
9 views and expectations that were established at that time,
10 such that if anybody contends that there's any ambiguity about
11 any aspect of the order, I believe that that would be the best
12 evidence to resolve any such disputes.

13 So, for the purpose of establishing Mr. Dondero's notice,
14 Mr. Dondero's participation, and the parties' discussions and
15 expectations with regard to every aspect of the corporate
16 governance settlement, including Mr. Dondero's stipulation,
17 the order that emerged from it, and the term sheet, we think
18 that that's properly into evidence.

19 THE COURT: Any objection?

20 All right. 6R will be admitted. Again, at Docket Entry
21 1822.

22 (Debtor's Exhibit 6R, Docket Entry 1822, is received into
23 evidence.)

24 MR. MORRIS: Next, Your Honor, we've got Exhibits 6S
25 as in Sam and 6T as in Thomas. They're companions. And they

1 can be found at **Docket 1866**. And those are the transcripts.
2 The first one is from the October 27th disclosure statement
3 hearing, and the second one actually is from the Patrick
4 Daugherty, I believe, lift stay motion.

5 I'll deal with the first one first, Your Honor. We
6 believe that the transcript of the October 27th hearing goes
7 to the good faith nature of the Debtor's proposed plan. It
8 shows that the Debtor and the Committee were not always
9 aligned on every interest. It shows that the Committee, in
10 fact, strenuously objected to certain aspects of the then-
11 proposed plan by the Debtors. And we just think it goes to
12 the heart of the good faith argument.

13 The transcript for the 28th, we would propose to offer for
14 the limited purpose of the commentary that you offered at the
15 end of that hearing, where Your Honor made it clear that
16 employee releases would not be -- would not likely be
17 acceptable to the Court unless there was some consideration
18 paid.

19 And it was really, frankly, Your Honor's comments that
20 helped spur the Committee and the Debtor to discuss over the
21 next few weeks the resolution of the issues concerning the
22 employee releases.

23 So we're not offering Exhibit 6T for anything having to do
24 with Mr. Daugherty or his claim, but just the latter portion
25 relating to the discussion about the employee releases. And,

1 with that, we'd move those transcripts into evidence.

2 THE COURT: Any objection?

3 MR. RUKAVINA: Your Honor, yes, I do object. 6S is
4 hearsay, and under Rule 804(b)(1) it's admissible only if the
5 witnesses are unavailable to be called. There's been no
6 suggestion that they're not.

7 As far as 6T, what Your Honor says is not hearsay, so as
8 long as it's just what Your Honor was saying, I do not object
9 to 6T. I object to the balance of it.

10 THE COURT: Okay. What about that objection on 6S?

11 MR. MORRIS: Yeah. One second, Your Honor. I would
12 go to the residual exception to the hearsay rule under 807.
13 807 specifically applies if the statement being offered is
14 supported by sufficient guarantees of trustworthiness and it's
15 more probative on the point -- and the point here is simply to
16 help buttress the Debtor's good faith argument -- and it's
17 more probative on the point than any other evidence. And I'm
18 not sure what better evidence there would be than an on-the-
19 record discussion between the Debtor and the Committee as to
20 the disputes they were having on the disclosure statement.

21 THE COURT: All right. I'm going to overrule the
22 objection and accept that 807 exception as being valid here.
23 So, I am admitting both 6S and 6T. And for the record, I
24 think you said they appeared at 1866. They actually appear at
25 1822.

1 MR. MORRIS: Okay, Your Honor. I am corrected. It
2 is 6S and 6T, and they are indeed at 1822. Forgive me.

3 THE COURT: Okay.

4 (Debtor's Exhibits 6S and 6T, Docket Entry 1822, is
5 received into evidence.)

6 MR. MORRIS: The next transcript and the last one is
7 6U, which is also at 1822. 6U is the transcript from the
8 December 10th hearing on the Debtor's motion for a TRO against
9 Mr. Dondero. We believe the entirety of that transcript is
10 highly relevant, and it relates specifically to the Debtor's
11 request for the exculpation, gatekeeper, and injunction
12 provisions of their plan. And on that basis, we would offer
13 that into evidence.

14 THE COURT: Any objection?

15 MR. TAYLOR: Yes, Your Honor. This is Clay Taylor on
16 behalf of Mr. Dondero.

17 We do object, on the same basis that it is hearsay. There
18 has certainly been plenty of testimony before this Court and
19 on the record as to why the Debtor believes that its plan
20 provisions are appropriate and allowable, and there's no need
21 to allow hearsay in for that. All of the witnesses were
22 available to be called by the Debtor. The Debtor is in the
23 midst of its case and can call whoever else it needs to call
24 to get these into evidence or to get those docs into evidence.
25 And therefore, we don't believe that any residual exception

1 should apply.

2 THE COURT: Mr. Morris, your response?

3 MR. MORRIS: First, Your Honor, any statements made
4 by or on behalf of Mr. Dondero would not be hearsay under
5 801(d)(2).

6 And secondly, there is no other evidence of the Debtor's
7 motion of the -- of the argument that was had. There is no
8 other evidence, let alone better evidence, than the transcript
9 itself. And I believe 807 is certainly the best rule to
10 capture that.

11 It is a statement that's supported by sufficient
12 guarantees of trustworthiness. Again, these are the litigants
13 appearing before Your Honor. It may not be sworn testimony,
14 but I would hope that everybody is doing their best to comply
15 with the guarantee of trustworthiness in that regard, putting
16 aside advocacy.

17 And it is more probative on the point for which we're
18 offering -- and that is on the very issues of exculpation,
19 gatekeeper, and injunction -- than anything else we can offer
20 in that regard.

21 THE COURT: All right. I overrule the objection and
22 I will admit 6U. Okay.

23 (Debtor's Exhibit 6U, Docket Entry 1822, is received into
24 evidence.)

25 MR. MORRIS: All right. Going back to the top, Your

1 Honor, Companions Exhibit D as in David and E as in Edward,
2 which are at Docket 1822.

3 Exhibit D is an email string that relates to the Debtor's
4 communications with the Creditors' Committee concerning a
5 transaction known as SSP, which stands for Steel Products --
6 Structural and Steel Products. So that was an asset that the
7 Debtor was selling, trying to sell at a particular point in
8 time. And Exhibit E is a deck that the Debtor had prepared
9 for the benefit of the UCC.

10 And if we looked that those documents, Your Honor, you'd
11 see that the Debtor was properly following the protocols that
12 were put in place in connection with the January 9th corporate
13 governance settlement. And the Committee is being informed by
14 the Debtor of what the Debtor intends to do with that
15 particular asset.

16 And the reason that it's particularly relevant here, Your
17 Honor, is Dustin Norris had submitted a declaration in support
18 of their motion that was heard on September -- on December
19 16th. That declaration is an exhibit to what is Exhibit A on
20 Docket 1822. Exhibit A on the docket is the Advisor and the
21 Funds' motion. Okay? So, Exhibit A is the motion. Attached
22 to that Exhibit A is an exhibit, which is Mr. Norris's
23 declaration.

24 At Paragraph 9 of Mr. Norris's declaration, he takes issue
25 with the Debtor's process for the sale of that particular

1 asset.

2 And so, having admitted already into the record Mr.
3 Norris's declaration, we believe that these documents rebut
4 the statements made in Mr. Norris's declaration, and indeed,
5 were part of the transcript that has now already been admitted
6 into evidence. So we think the documents are needed because
7 they were exhibits during that hearing.

8 THE COURT: All right. Any objection?

9 MR. RUKAVINA: Your Honor, yes, I object based on
10 authenticity. This document has not been authenticated, nor
11 has the attachment. And on hearsay. And I don't think that
12 the Debtor can introduce one exhibit just to introduce another
13 to rebut the first.

14 THE COURT: Your response?

15 MR. MORRIS: You know, in all honesty, I wish that
16 the authenticity objection had been made yesterday and I might
17 have been able to deal with that.

18 These documents have already been admitted by the Court
19 against these very same parties. I think it would be a little
20 unfair for them now to exclude the document that they had no
21 objection to the first time around. They clearly relate to
22 Paragraph 9 of Mr. Norris's declaration, which was admitted
23 into evidence in this case without objection.

24 THE COURT: All right. I overrule the objection. D
25 and E are admitted.

1 (Debtor's Exhibits D and E, Docket Entry 1822, is received
2 into evidence.)

3 MR. MORRIS: Next, Your Honor, we have Exhibits 4D as
4 in David, 4E as in Edward, and 4G as in Gregory. And those
5 can all be found on **Docket 1822**. And to just cut to the
6 chase, Your Honor, these are the K&L Gates letter that were
7 sent in late December and my firm's responses to those
8 letters.

9 Those letters are being offered, again, to support --
10 well, the Debtor contends that, in the context of this case,
11 and at the time and under the circumstances, the letters
12 constituted interference and evinces a disregard for the
13 January 9th order, for Mr. Dondero's TRO, and for the Court's
14 comments at the December 16th hearing. And they go
15 specifically to the Debtor's request for the gatekeeper,
16 exculpation, and injunction provisions.

17 To the extent that those exhibits contain the letters that
18 were sent on behalf of the Funds and on behalf of the
19 Advisors, they would simply not be hearsay under 801(d)(2).
20 And to the extent the objection goes to my firm's response, I
21 think just as a matter of completeness the Court -- I won't
22 offer them for the truth of the matter asserted. I'll simply
23 offer the Pachulski responses at those exhibits for the
24 purpose of stating the Debtor's position, without regard to
25 the truth of the matter asserted.

1 THE COURT: All right. Any objection?

2 MR. RUKAVINA: Your Honor, with that understanding,
3 I'll withdraw my objection to these exhibits.

4 THE COURT: All right. So, 4D, 4E, and 4G are
5 admitted.

6 (Debtor's Exhibits 4D, 4E, and 4G, Docket Entry 1822, are
7 received into evidence.)

8 MR. MORRIS: Next, Your Honor, we've got Exhibit 5T
9 as in Thomas. That document can be found at **Docket No. 1822**.
10 Your Honor, that document is a schedule of a long list of
11 promissory notes that are owed to the Debtor by the Advisors,
12 Dugaboy, and Mr. Dondero. But I think that, upon reflection,
13 I'll withdraw that exhibit.

14 THE COURT: All right.

15 (Debtor's Exhibit 5T is withdrawn.)

16 MR. MORRIS: And then, finally, just one last one. I
17 think Mr. Rukavina objected to Exhibit 70 as in Oscar, which
18 can be found at **Docket No. 1877**. Exhibit 70 are the documents
19 that were admitted in the January 21st hearing, and I believe
20 that they all go -- they're being offered to support the
21 Debtor's application for the gatekeeper, exculpation, and
22 injunction provisions.

23 THE COURT: All right. 70 is being offered. Any
24 objection?

25 MR. RUKAVINA: Yes, Your Honor. I do object. Those

1 are exhibits from a separate adversary proceeding that has not
2 been concluded. In fact, my witness is still on the stand in
3 that.

4 And I'll note that that's another 20,000 pages that's very
5 duplicative of the current record, and we already are going to
6 have an unwieldy record. So I question why Mr. Norris -- why
7 Mr. Morris would even need this.

8 So that's my objection, Your Honor.

9 MR. MORRIS: You know what? That's a fair point,
10 Your Honor. And -- that is a fair point, and I guess what I'd
11 like to do is at some point this morning see if I can single
12 out documents that are not duplicative and come back to you
13 with very specific documents. I think that's a very fair
14 point.

15 THE COURT: All right.

16 MR. MORRIS: And with that, Your Honor, I think we've
17 now addressed every single document that the Debtor has
18 offered into evidence, and I believe, other than the
19 withdrawal of --

20 THE COURT: 5T.

21 MR. MORRIS: -- 5T --

22 THE COURT: Uh-huh.

23 MR. MORRIS: -- and the open question on 70, I
24 believe every single document at **Docket 1822, 1866**, and 1877
25 has been admitted. Do I have that right?

1 THE COURT: All right. Yes, because I did admit
2 yesterday 7F through 7Q, minus 7O, at 1877. So, yes, I agree
3 with what you just said.

4 MR. RUKAVINA: Your Honor, I apologize. And Mr.
5 Morris. I have that 5S -- or six -- that 5S and 6C, Legal
6 Entities List, have not been admitted. But if I'm wrong on
7 that, then I apologize.

8 THE COURT: Okay. 5S was part of 1866, which I
9 admitted entirely.

10 And what was the other thing?

11 MR. RUKAVINA: I'm counting letters, Your Honor.
12 One, two, three, four. 6D, Legal Entities List, Redacted.

13 THE COURT: Okay. 6B would have been --

14 MR. RUKAVINA: D, Your Honor, as in dog. I'm sorry.
15 6-dog.

16 THE COURT: Okay. 6D, yeah, that was part of 1822
17 that I admitted *en masse* yesterday.

18 MR. MORRIS: Yeah, I didn't hear an objection to that
19 one yesterday, and I agree, Your Honor. My records show that
20 it was already admitted.

21 MR. RUKAVINA: Then I apologize to the Court.

22 THE COURT: All right. Any --

23 MR. MORRIS: No worries. Let's get --

24 THE COURT: Any other housekeeping matters before we
25 go to the next witness?

1 MR. MORRIS: No, Your Honor. Not from the Debtor.

2 THE COURT: Anyone else?

3 All right. Well, let's hear from the next witness.

4 MR. MORRIS: All right, Your Honor. The Debtor calls
5 as its next and last witness Marc Tauber.

6 THE COURT: All right. Mr. --

7 MR. MORRIS: Mr. Tauber, if you're on the phone,
8 please identify yourself.

9 (No response.)

10 THE COURT: Mr. Tauber, we're not hearing you.
11 Perhaps you are on mute. Could you unmute your device?

12 (No response.)

13 THE COURT: All right. If it's a phone, you need to
14 hit *6.

15 Hmm. Any -- do you know which caller he is?

16 THE CLERK: I'm trying to find out.

17 THE COURT: All right. We've got well over a hundred
18 people, so we can't easily identify where he is at the moment.

19 All right. Mr. Tauber, Marc Tauber? This is Judge
20 Jernigan. We cannot hear you, so -- all right. Well, maybe
21 we can --

22 MR. MORRIS: Can we just take a three-minute break
23 and let me see if I can track him down?

24 THE COURT: Yes. Why don't you do that? So let's
25 take a three-minute break.

1 MR. MORRIS: Thank you, Your Honor.

2 THE COURT: Okay.

3 (A recess ensued from 10:02 a.m. until 10:04 a.m.)

4 MR. MORRIS: Your Honor, if we may, he'll be dialing
5 in in a moment. But I've been reminded that there is one more
6 exhibit. It's the exhibit I used on rebuttal yesterday with
7 Mr. Seery. There was the one document that was on the docket,
8 and that was the Debtor's omnibus reply to the plan
9 objections, where we looked at Paragraph 135, I believe. And
10 we would offer that into evidence for the purpose of just
11 establishing that the Debtor had given notice no later than
12 January 22nd of its agreement in principle to assume the CLO
13 management contracts.

14 And then the second exhibit that we had offered that I
15 think I suggested could be marked as Exhibit 10A was the email
16 string between my firm and counsel for the CLO Issuers where
17 they agreed to the agreement in principle for the Debtor's
18 assumption of the CLO management contracts.

19 And we would offer both of those documents into evidence
20 as well.

21 THE COURT: All right. Any objections?

22 All right. Well, I will admit them.

23 As far as this email string with the CLO Issuers that you
24 called 10A, does that appear on the docket? I remember you
25 putting it on the screen, but, if not, you'll need to file a

1 supplement to the record, a supplemental exhibit.

2 MR. MORRIS: We will, Your Honor. We'll do that for
3 both of those exhibits.

4 THE COURT: And then as -- okay, for both? Because I
5 -- I've read that reply, and I could reference the docket
6 number if we need to.

7 MR. MORRIS: We'll clean that up, Your Honor.

8 THE COURT: Okay.

9 (Debtor's Exhibit 10A is received into evidence.)

10 (Clerk advises Court re new caller.)

11 THE COURT: Oh, okay. Just a minute. I was looking
12 up something.

13 (Pause.)

14 THE COURT: All right. Well, you're going to file --
15 hmm, I really wanted to just reference where that reply brief
16 appears on the record. There were a heck of a lot of things
17 filed on January 22nd.

18 (Interruption.)

19 THE COURT: Okay. We'll --

20 MR. MORRIS: All right. We're just going to need one
21 more minute with Mr. Tauber. It's my fault, Your Honor.

22 THE COURT: Okay.

23 MR. MORRIS: I didn't send him easily-digestible
24 dial-in instructions. He'll be just a moment.

25 THE COURT: Okay.

1 (Court confers with Clerk regarding exhibit.)

2 THE COURT: Oh, it's at 1807? Okay. So, the reply
3 brief that we talked about Paragraph 35, that is at Docket No.
4 1807. Okay? All right.

5 (Debtor's Omnibus Reply to Plan Objections, Docket 1807,
6 is received into evidence.)

7 (Pause.)

8 MR. TAUBER: Hi. It's Marc Tauber.

9 THE COURT: All right.

10 MR. MORRIS: Excellent.

11 THE COURT: Mr. Tauber, this is Judge Jernigan. I
12 can hear you, but I can't see you. Do you have a video --

13 MR. TAUBER: Yeah, I don't know why it's not working.

14 THE COURT: Hmm.

15 MR. TAUBER: I'm on WebEx all day. Usually it works
16 no problem.

17 THE COURT: Okay. Well, do you want to give it
18 another try or two?

19 MR. TAUBER: Yeah. It looks like it's starting to
20 come up. It's all -- pictures, so --

21 THE COURT: Okay.

22 MR. TAUBER: -- hopefully you'll be able to see me in
23 a second.

24 THE COURT: Okay. The first thing I'm going to need
25 to do is swear you in, so we'll see if the video comes up here

1 in a minute.

2 MR. TAUBER: Okay.

3 THE COURT: Can you see us, Mr. Tauber?

4 MR. TAUBER: I can see four people. The rest are
5 just names still.

6 THE COURT: Okay.

7 MR. TAUBER: I can go out and try to come back in, if
8 you think that's --

9 THE COURT: I'm afraid of losing you. So, your
10 audio, is it on your phone or is it on --

11 MR. TAUBER: No.

12 THE COURT: -- a computer?

13 MR. TAUBER: On the computer. Yeah.

14 THE COURT: Okay. So you're coming through loud and
15 clear on your computer.

16 MR. TAUBER: Yeah. Like I said, we use WebEx for
17 work, so I have them on all day long without any issues,
18 typically.

19 THE COURT: Okay.

20 (Court confers with Clerk.)

21 THE COURT: Okay. Our court reporter thinks it's a
22 bandwidth issue on your end, so I don't --

23 MR. TAUBER: There's only two of us here at home on
24 the line right now, so I don't know why. It looks like it's
25 trying to come in, and then just keeps --

Tauber - Direct

25

1 THE COURT: I at least see your name on the screen
2 now, which I did not before.

3 MR. TAUBER: Yeah.

4 THE COURT: So hopefully we're going to -- ah. We
5 got you.

6 MR. TAUBER: There it is.

7 THE COURT: All right.

8 MR. TAUBER: Yeah.

9 MR. MORRIS: There we go.

10 MR. TAUBER: I might lose you, though. Give me one
11 second, because I have a thing saying the WebEx meeting has
12 stopped working. Let me close that.

13 THE COURT: Okay. We've still got you. Please raise
14 your right hand.

15 MR. TAUBER: Okay.

16 MARC TAUBER, DEBTOR'S WITNESS, SWORN

17 THE COURT: All right. Thank you. Mr. Morris?

18 MR. MORRIS: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY MR. MORRIS:

21 Q Good morning, Mr. Tauber.

22 A Good morning.

23 Q I apologize for the delay in getting you the information.
24 Are you currently employed, sir?

25 A Yes, sir.

Tauber - Direct

26

1 Q By whom?

2 A Aon Financial Services.

3 Q And does Aon Financial Services provide insurance
4 brokerage services among its services?

5 A Yes.

6 Q And what position do you currently hold?

7 A Vice president.

8 Q How long have you been a vice president at Aon?

9 A Since October of 2019.

10 Q Can you just describe for the Court generally your
11 professional background?

12 A Sure. I spent about 20 years on Wall Street, working in a
13 variety of jobs, in research, trading, and as the COO of a
14 hedge fund. And then in 2010 I switched to the insurance
15 world. I was an underwriter for ten-plus years for Zurich and
16 QBE. And then in 2019 switched to the brokering side for Aon.

17 Q And what are your duties and responsibilities as a vice
18 president at Aon?

19 A Well, we're responsible or my team and I are responsible
20 for creating bespoke insurance programs, focusing on D&O and
21 E&O insurance for our insureds.

22 Q And what is, for the benefit of the record, what do you
23 mean by bespoke insurance program?

24 A Well, each client is different, so the programs and the
25 policies that we put in place might be off-the-shelf policies,

Tauber - Direct

27

1 but we endorse and amend them as needed to meet the needs of
2 the individual client.

3 Q And during your work, both as an underwriter and now as a
4 broker, have you familiarized yourself with the market for D&O
5 and E&O insurance policies?

6 A Yes.

7 Q All right. Let's talk about the early part of this case.
8 Did there come a time in early 2020 when Aon was asked to
9 place insurance on behalf of the board of Strand Advisors?

10 A Yes.

11 Q Can you describe for the Court how that came about?

12 A Sure. One of our account executives, a man by the name of
13 Jim O'Neill, had a relationship with a man named John Dubel,
14 who was one of the appointees to serve on -- as a member of
15 Strand, which was being appointed, as we understood it, to be
16 the general partner of Highland Capital Management by the
17 Bankruptcy Court. And they -- we had done -- or, Jim and John
18 had a longstanding relationship. I had actually underwritten
19 an account for a previous appointment of John's when I was an
20 underwriter, so I had some familiarity with John as well, and
21 actually brokered a subsequent deal for John at Aon.

22 So I had, again, some familiarity with John, and we were,
23 you know, tasked with going out and finding a program for
24 Strand.

25 Q Can you describe what happened next? How did you go about

Tauber - Direct

28

1 accomplishing that task?

2 A So, there are a number of markets or insurance companies
3 that provide management liability insurance, which this was a
4 management liability-type policy. D&O is a synonym for
5 management liability, I guess you'd say. And we approached
6 the, I think, 14 or 15 markets that we knew to provide
7 insurance in this space and that would be willing to buy the
8 type of policy we were seeking and have interest in a risk
9 like this, which had a little hair on it. Obviously, there
10 was the Dondero involvement, as well as the bankruptcy.

11 Q As part of that process, did you and your firm put
12 together a package of information for prospective interested
13 parties?

14 A Yes.

15 Q Can you describe for the Court what was contained in the
16 package?

17 A Had the C.V.s, some relevant pleadings from the case,
18 court order. I'd have to go back and look exactly. But sort
19 of just general, you know, general information that was
20 available about the situation at hand and Strand's
21 appointment.

22 Q And the court order that you just mentioned, is that the
23 one that had that gatekeeper provision in it?

24 A Correct.

25 Q And can you explain to the Court why you and your team

Tauber - Direct

29

1 decided to include the order with the gatekeeper provision in
2 the package that you were delivering to prospective carriers?

3 A Sure. In our initial conversations to discuss our
4 engagement, the gatekeeper function was explained to us by
5 John. And I'm not sure who else was on the initial call.
6 And, but it was explained to us that I guess Judge Jernigan
7 would sit as the gatekeeper between any potential claimant
8 against the insureds and, you know, would basically have to
9 approve any claim that would be made against (indecipherable),
10 which would thereby prevent any frivolous claims from
11 happening.

12 Q All right. Let's just talk for a moment. How did you and
13 your firm decide which underwriters to present the package to?

14 A Again, you know, I -- my background, or my Wall Street
15 background, obviously, sort of made me have a -- it was very
16 unique for the insurance world when I switched over, so I had
17 sort of risen to a certain level of expertise within the
18 space. And, you know, our team also is very experienced, and
19 decades of experience in the insurance world. So we're very
20 familiar with the markets that are willing to provide these
21 types of policies and the markets that would be likely to take
22 a look at a risk such as this.

23 Q Okay. You mentioned that there was -- I think your words
24 were a little hair on this, and one of the things you
25 mentioned was bankruptcy. How did the fact that Strand was

Tauber - Direct

30

1 the general partner of a debtor in bankruptcy impact your
2 ability to solicit D&O insurance?

3 A Well, it's just not a plain vanilla situation, so people
4 are somewhat, you know, are -- I think -- so, the type of
5 insurance, D&O insurance, that we write is very different from
6 auto insurance, as an example. Auto insurance, people expect
7 there to be a certain amount of claims, and they expect the
8 premiums to cover the claims plus the expenses and then
9 provide them a reasonable profit on top of that.

10 Our insurance is really much more by binary. The
11 expectation for underwriters is that they will be completing
12 ignoring -- or, avoiding risk at all costs, wherever possible.
13 So anytime there is a situation that looks a little risky, so
14 the premium might be a little higher, the deductible might be
15 a little higher, but, again, the underwriters are really
16 making a bet that they will not have a claim. Because the
17 premiums pale in comparison to the limits that are available
18 to the policyholder.

19 Q And so --

20 A So, -- I'm sorry. What were you going to say?

21 Q I didn't mean to interrupt.

22 A Yeah.

23 Q Have you finished your answer?

24 A Sure.

25 Q Okay. So, were some of the 14 or 15 markets that you

Tauber - Direct

31

1 contacted reluctant to underwrite because there was a
2 bankruptcy ongoing?

3 A Well, I think that probably -- I mean, there are certain
4 markets that we didn't go to in the beginning because they
5 would be very reluctant to write a risk that had that kind of
6 hair on it, based on our experience from dealing with them.
7 And, you know, I think the bankruptcy was certainly a little
8 bit of an issue. And then, obviously, as people did their
9 research and -- or if they weren't already familiar with
10 Highland and got to know, you know, got -- I will just say for
11 a simple Google search and learned a little bit about Mr.
12 Dondero, I think there was definitely some significant
13 reluctance to write this program.

14 Q Was the fact that the Debtor -- was the fact that the
15 Debtor is a partnership an issue that came up, in your -- in
16 your process?

17 A There are certainly some carriers who won't write what's
18 known as general partnership liability insurance. So, yes,
19 that is part of that. It was part of the limiting factor in
20 terms of who we went to.

21 Q Okay. And, finally, you mentioned Mr. Dondero. What role
22 did he play in your ability to obtain insurance for the Strand
23 board?

24 A Well, that's a very significant role. As, you know, as
25 mentioned, the underwriters are very risk-averse, so the

Tauber - Direct

32

1 litigiousness of Mr. Dondero is a very strong red flag
2 prohibiting a number of people from writing the insurance at
3 all. And the ones that were writing, that were willing to
4 provide options, were looking for protections from Mr.
5 Dondero.

6 Q And what kind of protections were they looking for?

7 A Well, the gatekeeper function was a key factor. That was
8 really the only way we could even start a conversation with
9 any of the people that we were able to engage. And in
10 addition, they wanted a, you know, sort of a belts and
11 suspenders additional protection of having an exclusion
12 preventing any litigation brought by or on behalf of Mr.
13 Dondero.

14 Q Were you able to identify any carrier who was prepared to
15 underwrite D&O insurance for Strand without the gatekeeper
16 provision or without a Dondero exclusion?

17 A We were not.

18 Q Okay. Let's fast-forward now. Has your firm been
19 requested to obtain professional management insurance for the
20 contemplated post-confirmation debtor entities and individuals
21 associated with those entities?

22 A Yes.

23 Q Okay. So let's just talk about the entities first, the
24 Claimant Trust and the Litigation Trust. In response to that
25 request, have you and your team gone out into the marketplace

Tauber - Direct

33

1 to try to find an underwriter willing to underwrite a policy
2 for those entities?

3 A Yes.

4 Q And have you been able to find any carrier who's willing
5 to provide coverage for the Claimant Trust and the Litigation
6 Trust?

7 A Yes.

8 Q And how many -- how many have expressed a willingness to
9 do that?

10 A Two.

11 Q And have those two carriers indicated that there would be
12 conditions to coverage for the entities?

13 A Both will require a -- the continuation of the gatekeeper
14 function, as well as a Dondero exclusion.

15 Q Okay. Have you also been tasked with the responsibility
16 of trying to find coverage for the individuals associated with
17 the Claimant Trust and the Litigation Trust, meaning the
18 Claimant Trustee, the Litigation Trustee, and the Oversight
19 Board?

20 A Yes. So we did it concurrently.

21 Q Okay. So, are the two firms that you just mentioned
22 willing to provide insurance for the individuals as well as
23 the entities?

24 A Correct. With the same stipulations.

25 Q They require -- they both require the gatekeeper and the

Tauber - Direct

34

1 Dondero exclusion?

2 A That's correct.

3 Q Is there any other firm who has indicated a willingness to
4 consider providing D&O insurance for the individuals?

5 A There is one that is willing to do so, as long as the
6 gatekeeper function remains in place. They have indicated
7 that if the gatekeeper function was to be removed, that they
8 would then add a Dondero exclusion to their coverage.

9 Q So is there any insurance carrier that you're aware of who
10 is prepared to insure either the individuals or the entities
11 without a gatekeeper provision?

12 A No.

13 Q And that last company, I just want to make sure the record
14 is clear: If the gatekeeper provision is overturned on appeal
15 or is otherwise not effective, do you have an understanding as
16 to what happens to the insurance coverage?

17 A They will either add an exclusion for any claims brought
18 by or on behalf of Mr. Dondero or cancel the coverage
19 altogether.

20 MR. MORRIS: I have no further questions, Your Honor.

21 THE COURT: All right. Cross of this witness?

22 CROSS-EXAMINATION

23 BY MR. RUKAVINA:

24 Q Mr. Tauber, I'm a little confused. So, the insurance
25 that's being written now for the post-bankruptcy entities, did

Tauber - Cross

35

1 I hear you say that there is one carrier that would give that
2 insurance subject to having a Dondero exclusion?

3 A So, first of all, there's nothing currently being written.
4 We have solicited quotes. So, just to make sure that that --
5 I want to make sure that's clear.

6 We have three carriers that are willing to provide varying
7 levels of coverage. All three will only do so with the
8 existence of the gatekeeper function continuing to be in
9 place. One of the three has -- two of those three will also
10 provide the coverage with -- even with the gatekeeper function
11 and the Dondero exclusion. The third one was not requiring a
12 Dondero exclusion unless the gatekeeper function goes away.

13 Q Okay. So the third one, you believe, will, whatever the
14 term is, write the insurance or provide the coverage without a
15 gatekeeper, as long as there is a strong Dondero exclusion?

16 A No. Their initial requirement is that the gatekeeper
17 function remains in place. That is their preferred option.
18 If the gatekeeper function is removed, then they will add a
19 Dondero exclusion in place of the gatekeeper exclusion. In
20 addition, that carrier is only willing to provide coverage for
21 the individuals, not for the entities.

22 Q Okay. Thank you.

23 MR. RUKAVINA: I'll pass the witness, Your Honor.

24 THE COURT: All right. Other cross?

25 MR. TAYLOR: Clay Taylor on behalf of Mr. Dondero.

Tauber - Cross

36

1 THE COURT: Okay.

2 CROSS-EXAMINATION

3 BY MR. TAYLOR:

4 Q Good morning, Mr. Tauber.

5 A Good morning.

6 Q Are you generally familiar with placing D&O insurance at
7 distressed debt level private equity firms?

8 A I am familiar with it probably more from the underwriting
9 side, and I also worked at a fund that was distressed and had
10 to be liquidated, so I -- as the COO, so I have a fair amount
11 of familiarity, yes.

12 Q Okay. Before taking this to market for the first time for
13 the pre-confirmation policies that you have in place, did your
14 firm conduct any due diligence or analysis of comparing the
15 amount of litigation the Highland entities and Mr. Dondero
16 were involved in as compared to other comparable firms in the
17 marketplace? Say, you know, Apollo, Fortress, Cerberus, other
18 similar market participants?

19 A Well, it wouldn't really be our role as the broker.
20 That's the role of the underwriter.

21 Q Are you familiar if any of the underwriters undertook any
22 such analysis?

23 A I would assume that they did, since they all had concerns
24 about Mr. Dondero almost immediately.

25 Q Do you have any -- you didn't conduct any personal due

Tauber - Cross

37

1 diligence on comparing the amount of litigation that the
2 Highland entities were involved in as compared to, say,
3 Fortress, do you?

4 A Well, again, that wouldn't really be my role as the
5 broker. But I will say that I used to write the primary
6 insurance for Fortress Investment Group when I was at Zurich.
7 So I'm extremely familiar with Fortress, to use your example,
8 and I would say that the level of litigation at Fortress was
9 much, just out of personal knowledge, was significantly less
10 than I had encountered or than I had read about at Highland.

11 Q That you have read about? Is that based upon a number of
12 cases where Fortress was a plaintiff as compared to Highland
13 was a plaintiff? Over what time period?

14 A Again, not my role. Not something that I've done. I'm
15 just generally familiar with Fortress and I'm generally
16 familiar with Highland.

17 Q All right. So you're generally familiar and you say that
18 -- you're telling me and this Court that Fortress is involved
19 in less litigation. Could you quantify that for me, please?

20 A No, but it's really irrelevant to the situation at hand.
21 The issue is not my feelings whatsoever. The issue is the
22 underwriters' feelings and their concern with Mr. Dondero, not
23 mine or anybody else's.

24 Q So, I appreciate your answer and thank you for that, but I
25 believe the question that was before you is, have you

Tauber - Cross

38

1 quantitatively -- do you have any quantitative analysis by
2 which you can back up the statement that Fortress is less
3 litigious than Highland?

4 A I wouldn't even try, no.

5 Q Okay. Do you have any quantitative analysis for -- that
6 Cerberus is any less litigious than Highland?

7 A I don't have any real knowledge of Cerberus's
8 litigiousness.

9 Q Same question as to Apollo.

10 A Again, the Fortress, you just happened to mention
11 Fortress, which was a special case because I used to be their
12 primary underwriter. I don't have any specific -- I'm not a
13 claims attorney. I don't have any specific knowledge of the
14 level of litigiousness.

15 And, again, it's not up to me, my decision. It's the
16 underwriters' decision of whether or not they're willing to
17 write the coverage, not mine.

18 Q You mentioned that the -- when you took this out to
19 market, it had a little hair on it. Correct?

20 A Correct.

21 Q And you put together a package of materials that you sent
22 out to 14 or 15 market participants; is -- did I get that
23 correct?

24 A Yes.

25 Q And in that package, you had certain pleadings, including

Tauber - Cross

39

1 the court order, correct?

2 A Yes. I believe that's correct.

3 Q And that was after your initial conversation with John and
4 -- where he pointed out the gatekeeper role. Correct?

5 A Correct.

6 Q And so when you went out to market, presumably you
7 highlighted the gatekeeper role to all the people you
8 solicited offers from because you thought it included less
9 risk, correct?

10 A It offered a level of protection that was not -- that's
11 not common. So it's, yes, it's a huge selling point for the
12 risk.

13 Q Okay. So, to be clear, you never went out to the market
14 to even see if you could get underwriting the first time
15 without the gatekeeper function; is that correct?

16 A Well, it's my job as a broker to present the risk in the
17 best possible light. So if we have a fact that makes the risk
18 a better write for the underwriters, we, of course, will
19 highlight it. So, no, I did not do that.

20 Q Okay. So, the quick answer to the question is no, you did
21 not go out and solicit any bids without the gatekeeper
22 function?

23 A Correct.

24 Q When you have approached the market for the post-
25 confirmation potential coverage, did you approach the same 14

Tauber - Cross

40

1 or 15 parties that you did before?

2 A I don't have the two lists in front of me. They would
3 have been vastly similar, yes.

4 Q Okay. And so, again, all of the 14 or 15 parties or the
5 lists that you solicited were already familiar with the
6 gatekeeper function, correct?

7 A Yes.

8 Q And so therefore they already had that right; they're not
9 going to trade against themselves and therefore say that,
10 without it, we'll go ahead and write coverage. Correct?

11 A I -- I -- it'd be hard to answer that question. I don't
12 know.

13 Q Okay. Because you didn't try that, did you?

14 A I would have had no reason to, no.

15 Q Okay. So you don't know if a market exists without the
16 gatekeeper function because you haven't asked, have you?

17 A I guess that's fair, yeah.

18 MR. TAYLOR: I have no further questions.

19 THE COURT: All right. Any other Objectors with
20 cross-examination?

21 MR. DRAPER: I have no questions for the witness,
22 Your Honor.

23 THE COURT: All right. Anyone else? Mr. Morris,
24 redirect?

25 MR. MORRIS: Just one.

Tauber - Redirect

41

1 REDIRECT EXAMINATION

2 BY MR. MORRIS:

3 Q One question, Mr. Tauber. Is there any -- do all
4 underwriters -- any underwriters for Fortress require, as a
5 condition to underwriting the D&O insurance, require a
6 gatekeeping provision?

7 A In my, you know, 11, 12 years of experience in this
8 industry, in this space, I have never seen that gatekeeper
9 function be available, as an underwriter or as a broker. So,
10 no.

11 MR. MORRIS: No further questions, Your Honor.

12 THE COURT: Any recross on that redirect?

13 All right. Well, Mr. Tauber, you are excused. We thank
14 you for your testimony today. So you can log off.

15 THE WITNESS: Thank you.

16 THE COURT: Okay.

17 (The witness is excused.)

18 THE COURT: Mr. Morris, does the Debtor rest?

19 MR. MORRIS: The Debtor does rest, Your Honor.

20 THE COURT: All right. Well, what are we going to
21 have from the Objectors as far as evidence?

22 MR. RUKAVINA: Your Honor, I will be very short. I
23 will call Mr. Seery for less than ten minutes. I will call
24 Mr. Post for less than ten minutes. I will have one exhibit.
25 And I think that that's it for all the Objectors, unless I'm

1 mistaken, gentlemen.

2 MR. TAYLOR: Your Honor, I had one witness, Mr.
3 Sevilla, under subpoena to testify, and needed a brief moment
4 to discuss with my colleagues whether we're going to call him,
5 and if so, put him on notice that he would be coming up
6 probably about -- I don't know your schedule, Your Honor, but
7 probably, I'm guessing, either before lunch or after, and I
8 need to let him know that also.

9 So I do need a brief three to five minutes to confer with
10 my colleagues and some direction from the Court to, if we
11 decide to call him, as to when we would tell him to be
12 available.

13 THE COURT: All right. Well, before I get to that,
14 Mr. Draper, do you have any witnesses?

15 MR. DRAPER: I do not.

16 THE COURT: All right. Well, let's see. It's 10:34.
17 We're making good time this morning. If Seery is truly ten
18 minutes of direct, and Post is truly ten minutes of direct,
19 and I don't know how long the documentary exhibits are going
20 to take, it sounds to me like we are very likely to get to Mr.
21 Sevilla before a lunch break.

22 So if you want to -- you know, I don't know what that
23 involves, you sending text messages or making a quick phone
24 call. Do you need a five-minute break for that?

25 MR. TAYLOR: Yes, Your Honor. It involves a phone

1 call and an email. Just a confirmatory phone call just to
2 make sure that the guy -- just so you know who he is, he is
3 actually a Highland employee, but he's represented by separate
4 counsel, and so we do need to go through him just because
5 that's the right thing to do.

6 THE COURT: All right. Well, again, I mean, I never
7 know how long cross is going to take, but I'm guessing, you
8 know, we're going to get to him in an hour or so, if not
9 sooner, it sounds like. So, all right. So, do we need a
10 five-minute break?

11 MR. RUKAVINA: And Your Honor, it might make more
12 sense to make it a ten-minute break. I suspect that Mr.
13 Taylor will be able to release his witness if he and I will
14 just be able to talk. So I would ask the Court's indulgence
15 for a ten-minuter.

16 THE COURT: Okay. We'll take a ten-minute break.
17 We'll come back at 10:46 Central time.

18 THE CLERK: All rise.

19 (A recess ensued from 10:36 a.m. until 10:46 a.m.)

20 THE CLERK: All rise.

21 THE COURT: Please be seated. We're going back on
22 the record in the Highland confirmation hearing. Are the
23 Objectors ready to proceed?

24 MR. RUKAVINA: Your Honor, Davor Rukavina. We are.

25 THE COURT: All right. Well, Mr. Rukavina, are you

1 going to call your witnesses first?

2 MR. RUKAVINA: Yes, I will. Before that, if it might
3 help the Court and Mr. Morris: Mr. Morris, with respect to
4 that last exhibit, I do not object to the admission of any of
5 the exhibits that were admitted at that PI hearing.

6 But I do think, Your Honor, for the record, that -- and I
7 would ask Mr. Morris that he should refile those exhibits here
8 in this case, except for those that are duplicative. Because,
9 again, there's 10,000 pages of indentures, et cetera.

10 MR. MORRIS: Thank you very much, sir.

11 Your Honor, if that's acceptable to you, we'll do that as
12 soon as possible.

13 THE COURT: All right. And let me make sure the
14 record is clear. Are we talking about what you've described
15 as 70? I'm getting mixed up now. Am I --

16 MR. MORRIS: Yes, Your Honor.

17 THE COURT: Okay.

18 MR. MORRIS: It's 70, which is the documents that
19 were introduced into evidence in the prior hearing. And Mr.
20 Rukavina is exactly right, that there is substantial overlap
21 between that and other documents that have already been
22 admitted in the record in this case. So we'll just file an
23 abridged version of Exhibit O that only includes non-
24 duplicative documents.

25 THE COURT: All right. So that will be admitted, and

Seery - Direct

45

1 we'll look for your filed abridged version to show up on the
2 docket. 70.

3 (Debtor's Exhibit 70 is received into evidence as
4 specified.)

5 THE COURT: All right. What's next?

6 MR. RUKAVINA: Your Honor, Jim Seery, please. Mr.
7 James Seery.

8 THE COURT: All right. Mr. Seery, welcome back.
9 Please raise your right hand.

10 MR. SEERY: Can you -- can you hear me, Your Honor?

11 THE COURT: I can now.

12 JAMES P. SEERY, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

13 THE COURT: All right. Thank you.

14 Mr. Rukavina, go ahead.

15 DIRECT EXAMINATION

16 BY MR. RUKAVINA:

17 Q Mr. Seery, --

18 MR. RUKAVINA: Thank you.

19 BY MR. RUKAVINA:

20 Q Mr. Seery, good morning.

21 MR. RUKAVINA: Mr. Vasek, if you'll please pull up
22 the schedules.

23 What we have here, Your Honor, is **Docket 247**, the Debtor's
24 schedules. I'd ask the Court to take judicial notice of it.

25 THE COURT: All right. The Court will do so.

Seery - Direct

46

1 BY MR. RUKAVINA:

2 Q Mr. Seery, are you familiar with these entities listed
3 here on the Debtor's schedules?

4 A Generally. Each one a little bit different.

5 Q Okay. Do you agree that the Debtor still owns equity
6 interests in these entities?

7 A I believe it does, yes.

8 Q Okay. Is it true that none of these entities are publicly
9 traded?

10 A I don't believe any of these are publicly-traded entities,
11 no.

12 Q Okay. And none of these, to your knowledge, are debtors
13 in this bankruptcy case, right?

14 A No. We only have one debtor in the case.

15 Q Okay. So, Highland Select Equity Fund, LP, the Debtor
16 owns more than 20 percent of the equity in that entity, right?

17 A I believe the Debtor owns the majority of that entity.
18 That is a fund with an on- and offshore feeder. And I, off
19 the top of my head, don't recall exactly how the allocations
20 of equity work. But I believe we do.

21 Q Does 67 percent refresh your memory? Are you prepared to
22 say that the Debtor owns 67 percent of that equity?

23 A I'm not prepared to say that, no.

24 Q Okay. Wright, Ltd. Does the Debtor own more than 20
25 percent of that equity?

Seery - Direct

47

1 A There's about -- I don't recall. There's about at least
2 25 artist, designers, or designs. Wright, AMES, Hockney,
3 Rothco, all own in different places, and they all own in turn
4 some other thing. So I don't know what each of them, off the
5 top of my head, own. There's -- they're part of a myriad of
6 corporate structures here.

7 Q Strak, Ltd. Do you know whether the Debtor owns more than
8 20 percent of the equity of that entity?

9 A Stark? I don't know.

10 Q Okay. I don't know how to pronounce the next one. Eamis
11 (phonetic) Ltd. Do you know whether the Debtor owns more than
12 20 percent of that equity?

13 A Off the top of my head, I don't recall.

14 Q What about Maple Avenue Holdings, LLC?

15 A I believe, I don't know if it's directly or indirectly,
16 that we own a hundred percent of that entity. But I'm not
17 sure.

18 Q What about Highland Capital Management Korea, Ltd.?

19 A Effectively, Highland Capital Management is owned a
20 hundred percent.

21 Q What about Highland Capital Management Singapore Pte.
22 Ltd.?

23 A We are in the process of shutting it down, so I don't know
24 that -- what the equity percentages are. It's really just a
25 question -- it's -- it's dissolved save for a signature from a

Seery - Direct

48

1 Singaporean.

2 Q Okay. But did the Debtor own more than 20 percent of that
3 entity?

4 A I don't know the specific allocations of equity ownership.

5 Q Okay. What about Pennant (phonetic) Management, LP? Do
6 you know whether the Debtor owns or owned more than 20 percent
7 of that entity?

8 A I don't recall, no.

9 MR. RUKAVINA: You can take that exhibit down, Mr.
10 Vasek.

11 BY MR. RUKAVINA:

12 Q Mr. Seery, very quick, are you familiar with Bankruptcy
13 Rule 2015.3?

14 A I am, yes.

15 Q Okay. Has the Debtor filed any Rule 2015.3 statements in
16 this case?

17 A I don't believe we have.

18 Q Okay.

19 MR. RUKAVINA: Thank you, Your Honor. I'll pass the
20 witness.

21 THE COURT: All right. Any other Objector
22 questioning? None from Mr. Taylor, none from Mr. Draper, none
23 from Ms. Drawhorn?

24 All right. Any cross -- any examination from you, Mr.
25 Morris?

Seery - Cross

49

1 MR. MORRIS: Just one question.

2 THE COURT: Go ahead.

3 CROSS-EXAMINATION

4 BY MR. MORRIS:

5 Q Mr. Seery, do you know why the Debtor has not yet filed
6 the 2015.3 statement?

7 A I have a recollection of it, yes.

8 Q Can you just describe that for the Court?

9 A When we -- when we initially filed, when the Debtor filed
10 and it was transferred over, we started trying to get all the
11 various rules completed. There are, as the Court is aware, at
12 least a thousand and maybe more, more like three thousand,
13 entities in the total corporate structure.

14 We pushed our internal counsel to try to get that done,
15 and were never able to really get it completed. We did not
16 have -- we were told we didn't have separate consolidating
17 statements for every entity, and it would be difficult. And
18 just in the rush of things that happened from the first
19 quarter into the COVID into the year, we just didn't complete
20 that filing. There was no reason for it other than we didn't
21 get it done initially and I think it fell through the cracks.

22 MR. MORRIS: Nothing further, Your Honor.

23 THE COURT: All right. Anything further, Mr.
24 Rukavina?

25 REDIRECT EXAMINATION

Seery - Redirect

50

1 BY MR. RUKAVINA:

2 Q Mr. Seery, I appreciate that answer. But you never sought
3 leave from the Bankruptcy Court to postpone the deadlines for
4 filing 2015.3, did you?

5 A No. If it hadn't fallen through the cracks, it would have
6 been something we recalled and we would have done something
7 with it. But, frankly, it just fell off the -- through the
8 cracks. We didn't deal with it.

9 Q Okay.

10 MR. RUKAVINA: Thank you, Your Honor. Thank you, Mr.
11 Seery.

12 THE COURT: All right. Any other Objector
13 examination?

14 Mr. Morris, anything further on that point?

15 MR. MORRIS: No, thank you, Your Honor. No further
16 questions.

17 THE COURT: All right. Mr. Seery, thank you. You're
18 excused once again from the witness stand.

19 (The witness is excused.)

20 THE COURT: Your next witness?

21 MR. SEERY: Thank you, Your Honor.

22 THE COURT: Uh-huh.

23 MR. RUKAVINA: Your Honor, I'll call Jason Post. Mr.
24 Post, if you're listening, which I believe you are, if you'll
25 please activate your camera.

Post - Direct

51

1 THE COURT: Mr. Post, we do not see or hear you yet.

2 MR. RUKAVINA: Talk, Mr. Post, and I think it'll
3 focus on you.

4 MR. POST: Yes. Can you hear me now?

5 THE COURT: We can hear you. We cannot see you yet.
6 Could you say, "Testing, one, two; testing, one, two"?

7 MR. POST: Testing, one, two. Testing, one, two.

8 THE COURT: There you are. Okay. Please raise your
9 right hand.

10 JASON POST, CERTAIN FUNDS AND ADVISORS' WITNESS, SWORN

11 THE COURT: All right. Thank you. You may proceed.

12 DIRECT EXAMINATION

13 BY MR. RUKAVINA:

14 Q Mr. Post, good morning. State your name for the record,
15 please.

16 A Robert Jason Post.

17 Q How are you employed?

18 A I'm employed by NexPoint Advisors, LP.

19 Q What is your title?

20 A Chief compliance officer.

21 Q Were you ever employed by the Debtor here?

22 A Yes.

23 Q Between when and when? Approximately?

24 A I believe it was July of '08 through October of 2020.

25 Q What was your last title while you were employed at the

Post - Direct

52

1 Debtor?

2 A Still chief compliance officer. For the retail funds.

3 Q Okay. Very, very quickly, what does a chief compliance
4 officer do? Or what do you do?

5 A It's multiple things. Interaction with the regulators.

6 Adherence to prospectus and SAI limitations for the funds.

7 And then establishment of written policies and procedures to
8 prevent and detect violations of the federal securities laws
9 and then testing those on a frequent basis.

10 Q And I believe you mentioned you're the CCO for NexPoint
11 Advisors and Highland Capital Management Fund Advisors. Are
12 you also the CCO for any funds that they advise?

13 A Yes. For all the funds that they advise.

14 Q Okay. Does that include so-called retail funds?

15 A Yes. They're all retail funds.

16 Q What is a retail fund?

17 A It typically constitutes funds that are subject to the
18 Investment Company Act of 1940, such as open-end mutual funds,
19 closed-end funds, ETFs.

20 Q Obviously, you know who my clients are. Are any of my
21 clients so-called retail funds that you just described?

22 A Yes.

23 Q Name them, please.

24 A You've got NexPoint Capital, Inc., Highland Income Fund,
25 and NexPoint Strategic Opportunities Fund.

Post - Direct

53

1 Q Do those three retails funds hold any voting preference
2 shares in the CLOs that the Debtor manages?

3 A Yes.

4 MR. RUKAVINA: Mr. Vasek, if you'll please pull up
5 Exhibit 2.

6 Your Honor, I believe I have a stipulation with Mr. Morris
7 that this exhibit can be admitted, so I'll move for its
8 admission.

9 MR. MORRIS: No objection, Your Honor.

10 THE COURT: All right. Exhibit 2 will be admitted.
11 And let's be clear. That appears at -- is it Docket No. --
12 let's see. Is it 1673 that you have your -- no, no, no, no.
13 1670? Is that where your exhibits are?

14 MR. RUKAVINA: No, Your Honor. It's 1863. I think
15 we did an amended one because we numbered our exhibits instead
16 of having seventeen Os and Ps. So it's 1863.

17 THE COURT: 1863? Okay. All right. There it is.
18 Okay. Again, this is -- I'm sorry. I got sidetracked. What
19 exhibit? It's Exhibit 2, is admitted. Okay.

20 MR. RUKAVINA: Thank you, Your Honor.

21 (Certain Funds and Advisors' Exhibit 2 is received into
22 evidence.)

23 BY MR. RUKAVINA:

24 Q Real quick, Mr. Seery. What do these HIF, NSOF, NC, what
25 do they stand for? Do they stand for the retail funds you

Post - Direct

54

1 just named?

2 MR. SEERY: I don't think he meant me.

3 THE WITNESS: Yeah.

4 BY MR. RUKAVINA:

5 Q I'm sorry, Mr. Post. I didn't hear you.

6 A You addressed me as Mr. Seery.

7 Q Oh. I apologize. What do those initials stand for?

8 A The names of the funds that I mentioned.

9 Q Okay. And what do these percentages show?

10 A The percentages show the amount of shares outstanding and
11 the preference shares that each of the respective funds hold
12 of the named CLOs.

13 Q And those CLOs on the left there, those are the CLOs that
14 the Debtor manages pursuant to agreements, correct?

15 A Yes. Those are some of them, correct.

16 Q Yes. The ones that the retail funds you mentioned have
17 interests in, correct?

18 A Correct.

19 Q And what does the far-right column summarize or show?

20 A That would be the aggregate across the three retail funds.

21 Q In each of those CLOs?

22 A Correct.

23 Q Thank you.

24 MR. RUKAVINA: Mr. Vasek, you may pull this down.

25 BY MR. RUKAVINA:

Post - Direct

55

1 Q Mr. Post, in the aggregate, how much do those three retail
2 funds have invested in those CLOs, ballpark?

3 A I believe it's approximately \$130 million, give or take.

4 Q Is it closer to 140 or 130?

5 A A hundred -- I think it's 140, actually.

6 Q Okay. Thank you. Who controls those three retail funds?

7 A Ultimately, the board --

8 Q And what --

9 A -- of the funds.

10 Q What is -- what do you mean by the board? Do they have
11 independent boards?

12 A Yes. They have a majority independent board, the funds
13 do.

14 Q Do you report to that board?

15 A Yes.

16 Q Does Mr. Dondero sit on those boards?

17 A He does not.

18 Q Okay.

19 MR. RUKAVINA: I'll pass the witness, Your Honor.

20 Thank you, Mr. Post.

21 THE COURT: All right. Any other Objector
22 examination of Mr. Post?

23 All right. Mr. Morris, do you have cross?

24 MR. MORRIS: Yes, Your Honor, I do.

25 THE COURT: Okay.

Post - Cross

56

1 CROSS-EXAMINATION

2 BY MR. MORRIS:

3 Q Mr. Post, can you hear me okay, sir?

4 A Yes, I can hear you.

5 Q Okay. Nice to see you again. When did you first join
6 Highland?

7 A I believe it was July of '08.

8 Q So you've worked with the Highland family of companies for
9 about a dozen years now; is that right?

10 A Yes.

11 Q And you were actually employed by the Debtor from 2008
12 until October 2020; is that right?

13 A Correct.

14 Q And you left at that time and went to join Mr. Dondero as
15 the chief compliance officer of the Advisors; do I have that
16 right?

17 A Yes. I transitioned to NexPoint Advisors shortly, I
18 believe, after Mr. Dondero left, but I was already the named
19 CCO for that entity.

20 Q Right, but your employment status changed from being an
21 employee of the Debtor to being an employee of NexPoint; is
22 that right?

23 A Correct.

24 Q And that happened shortly after Mr. Dondero resigned from
25 the Debtor and went to NexPoint Advisors, correct?

Post - Cross

57

1 A Correct.

2 Q Okay. You mentioned that the funds are controlled by
3 independent boards; do I have that right?

4 A It's a majority independent board, correct.

5 Q Okay. There's no independent board member testifying in
6 this hearing, is there?

7 A I --

8 MR. RUKAVINA: Your Honor, Mr. Post wouldn't know
9 that, but I'll stipulate to that as a fact.

10 THE COURT: All right.

11 MR. MORRIS: Okay.

12 BY MR. MORRIS:

13 Q Did you -- do you speak with the board members from time
14 to time?

15 A Yes.

16 Q Did you tell them that it might be best if they came and
17 identified themselves and helped persuade the Court that they
18 were, in fact, independent?

19 A They have counsel to assist them with that determination.
20 I never mentioned anything along those line to them.

21 Q Okay. Can you tell me who the board members are?

22 A Yes. Ethan Powell, Bryan Ward, Dr. Bob Froehlich, John
23 Honis, and then Ed Constantino. He is only a board member,
24 though, for NSOF. NexPoint Strategic Opportunities Fund.

25 Q All right. Mr. Honis, is he -- has he been determined to

Post - Cross

58

1 be an interested director, for purposes of the securities
2 laws?

3 A Yes.

4 Q Okay. Mr. Froeh..., do you know much about his
5 background?

6 A I believe he worked at Deutsche Bank and a couple of the
7 other -- or maybe a couple of other investment firms in the
8 past. And he also owns a minor league baseball team.

9 Q Do you know how long he served as a director of the funds?

10 A I don't know, approximately. I think maybe seven -- six,
11 seven years.

12 Q Okay. How about Mr. Ward? Did Mr. Froehlich ever work
13 for Highland?

14 A Not that I can recall.

15 Q Did Mr. Ward ever work for Highland?

16 A Not that I can recall.

17 Q Do you recall how long he's been serving as a director of
18 the funds?

19 A Mr. Ward?

20 Q Yes.

21 A I believe -- I'd be -- I don't recall specifically. I
22 think it's been, you know, 10 to 12 years, give or take.

23 Q He was a director when you got to Highland; isn't that
24 right?

25 A He was on the board of directors.

Post - Cross

59

1 Q Yeah. So fair to say that Mr. Ward has been a director
2 since at least the mid to late oughts? 2005 to 2008?

3 A I'm sorry, you cut out. Late what?

4 Q The late oughts. Withdrawn. Is it fair to say that Mr.
5 Ward's been a director of the funds since somewhere between
6 2005 and 2008?

7 A Again, I don't recall specifically. You know, I joined
8 the complex, the retail complex as the named CCO in 2015, and
9 he had been serving in that role prior to that, and I believe
10 it was for probably a period of five to seven years, so that
11 sounds in line.

12 Q Did you have a chance to review Dustin Norris's testimony
13 from the December 16th hearing?

14 A I did not.

15 Q Do you know -- are you aware that he testified at some
16 length regarding the relationship of each of these directors
17 to Mr. Dondero and Highland?

18 A I didn't review anything, so I don't know what he said or
19 how long it took.

20 Q Do you know if Mr. Powell's ever worked for Highland?

21 A He has.

22 Q Do you know in what capacity and during what time periods?

23 A He was -- I think his last title was -- I believe was
24 chief product strategist, I believe. And he was also the
25 named PM for one of -- or, a suite of ETF funds. I think he

Post - Cross

60

1 was last employed maybe --from my recollection, 2014,
2 possibly. Or 2015. Somewhere around in there.

3 Q Okay. And to the best of your knowledge, did Mr. Dondero
4 appoint Mr. Powell to be the chief product strategist?

5 A I don't -- I don't know. I wasn't involved in the
6 decision for his appointment. I don't know how he attained
7 that role.

8 Q To the best of your knowledge, did Mr. Dondero appoint Mr.
9 Powell as the PM of the ETF funds?

10 A Again, I wasn't involved in that determination, but he
11 probably would have had a role in making the determination on
12 who was the PM, along with probably some other investment
13 professionals.

14 Q Okay. And did Mr. Powell join the board of the funds
15 before or after he left Highland around 2015?

16 A I can't recall specifically if he was already on the board
17 or was an interested member, but I believe he, you know, I
18 believe he joined shortly after he left.

19 Q Okay. So he went from being an employee and being a
20 portfolio manager at Highland to being on the board of these
21 funds. Do I have that right?

22 A Again, I can't recall specifically. He may have already
23 been on the board as an interested board member. But, you
24 know, I believe, you know, if that wasn't the case, he would
25 have joined the board shortly after leaving.

Post - Cross

61

1 Q And Mr. Ward, I think you said, has been on the funds'
2 board since somewhere between 2005 and 2008. Does that sound
3 right?

4 A I think that was a time frame you referenced, and I think
5 that was kind of in line, walking it back. But I don't recall
6 specifically when he joined.

7 Q And to the best of your knowledge, have the Advisors for
8 which you serve as the chief compliance officer managed the
9 Funds for which Mr. Ward has served as a director since the
10 time he became a director?

11 A I'm sorry. Can you repeat the question?

12 Q Yeah. I'm just trying to understand if the advisors --
13 withdrawn. The Advisors manage the Funds; do I have that
14 right?

15 A They provide investment advice on behalf of the Funds.

16 Q And they do that pursuant to written agreements; do I have
17 that right?

18 A Correct.

19 Q And is it your understanding that, for the entire time
20 that Mr. Ward has served as a member of the board of the
21 Funds, the Advisors have provided the investment advice to
22 each of those Funds?

23 A Yes, in one form or fashion. I believe at one period in
24 time, historically, the Advisor may have changed its name, but
25 it would have been, you know, at the end of the day, one or

Post - Cross

62

1 more -- one of either NexPoint Advisors or Highland Capital
2 Management Fund Advisors would have advised those Funds.

3 Q Is it fair to say that each of the Advisors for which you
4 serve as the chief compliance officer has always been managed
5 by an Advisor owned and controlled by Mr. Dondero?

6 A I believe so, yes.

7 MR. MORRIS: I have no further questions, Your Honor.

8 THE COURT: All right. Any redirect?

9 MR. RUKAVINA: Yes.

10 THE COURT: Okay. Mr. Rukavina?

11 MR. RUKAVINA: Your Honor, was I on mute? I
12 apologize.

13 THE COURT: Yes.

14 REDIRECT EXAMINATION

15 BY MR. RUKAVINA:

16 Q Mr. Post, why did you leave Highland?

17 A It -- because I was a HCMLP employee and it was --
18 basically, there was conflicts that were created by being an
19 employee of the Debtor and by also serving as the CCO to the
20 named Funds and the Advisors, and it coincided with Jim
21 toggling over from HCMLP to NexPoint. It just made sense more
22 functionally and from a silo perspective for me to be the
23 named CCO for that entity since he was no longer an employee
24 of HCMLP.

25 Q And by Jim, you mean Jim Dondero?

Post - Redirect/Recross

63

1 A Yes, sorry. Jim Dondero.

2 Q You're not some kind of lackey for Mr. Dondero, where you
3 go wherever he goes, are you?

4 MR. MORRIS: Objection to the question.

5 THE WITNESS: No.

6 THE COURT: Overruled. He can answer.

7 MR. RUKAVINA: Okay.

8 THE WITNESS: No.

9 MR. RUKAVINA: Okay. Thank you, Your Honor. I'll
10 pass the witness.

11 THE COURT: Any other Objector examination?

12 All right. Any recross, Mr. Morris?

13 RECROSS-EXAMINATION

14 BY MR. MORRIS:

15 Q Just one question, sir. The conflicts that you just
16 mentioned, they were in existence for the one-year period
17 between the petition date and the date you left; isn't that
18 right?

19 A I think -- I believe so, and I think they became more
20 evident as, you know, time progressed.

21 Q Okay. But they existed on day one of the bankruptcy
22 proceeding; isn't that right?

23 A Yes, I believe so.

24 Q All right.

25 MR. MORRIS: No further questions, Your Honor.

Post - Recross

64

1 THE COURT: All right. Thank you, Mr. Post. You're
2 excused from the virtual witness stand.

3 (The witness is excused.)

4 THE COURT: All right. Your next witness?

5 MR. RUKAVINA: Your Honor, my exhibit has been
6 admitted, I promised I'd be short, and my evidentiary
7 presentation is done. Thank you.

8 THE COURT: All right. Well, Mr. Taylor, your
9 evidence?

10 MR. TAYLOR: First of all, given the testimony that
11 we have received just recently, we have released Mr. Sevilla
12 from his subpoena and are not going to call him.

13 With that being said, we do have some documents that we
14 would like to get into evidence. We filed our witness and
15 exhibit list at **Docket No. 1874**. I don't believe any of these
16 are controversial. I'm trying to keep from duplicating those
17 that are already into evidence by the Debtor. And therefore I
18 would like to offer into evidence Exhibits No. 6 through 12
19 and 17. And that is it, Your Honor.

20 THE COURT: Okay. Is there any objection to Dondero
21 Exhibits 6 through 12 and 17, appearing at **Docket 1874**?

22 MR. MORRIS: I just want to be clear that Exhibits 6
23 and 7, which are letters, I believe, from Mr. Lee (phonetic)
24 are not being offered for the truth of the matter asserted in
25 either letter.

1 MR. TAYLOR: That is correct, Your Honor. Just
2 merely that those requests and the words that were stated in
3 there were indeed sent on those dates.

4 MR. MORRIS: And the same comment, Your Honor, with
5 respect to Exhibits 9 through 12, that those documents are not
6 being offered for the truth of the matter asserted.

7 MR. TAYLOR: Again, just that those requests were
8 sent and those responses as stated were sent.

9 And I apologize. I missed one, Your Honor. Also No. 15.
10 6 through 12, 15, and 17.

11 MR. MORRIS: Your Honor, the Debtor has no objection
12 to Exhibits 15, 16, and 17.

13 THE COURT: All right. So, so they are all admitted
14 with the representation that 6 and 9 through 12 are not being
15 offered for the truth of the matter asserted. With that
16 representation, you have no objection, Mr. Morris?

17 MR. MORRIS: That's right. I do just want to get
18 confirmation that Exhibits 1 through 5 and 13 through 16 -- 13
19 and 14 are not being offered at all.

20 THE COURT: Mr. Taylor?

21 MR. TAYLOR: So, that -- that is correct. 1 through
22 5 would be duplicative of what has already been introduced
23 into the record by Mr. Morris, so I am not offering those.
24 And do not believe that 13 and 14 are relevant anymore, and so
25 therefore did not offer those.

1 THE COURT: Okay. So, with that, I have admitted 6
2 through 12, 15, 16, and 17 at Docket Entry 1874.

3 (Dondero Exhibits 6 through 12 and 15 through 17 are
4 received into evidence.)

5 THE COURT: All right. Anything else, Mr. Taylor?

6 MR. TAYLOR: No, Your Honor. We are not calling any
7 witnesses.

8 THE COURT: All right. Mr. Draper, what about you?
9 Any evidence?

10 MR. DRAPER: No evidence or witnesses. The evidence
11 that's been introduced by Mr. Taylor and Mr. Rukavina are
12 sufficient for me.

13 THE COURT: All right. Ms. Drawhorn, anything from
14 you?

15 MS. DRAWHORN: No additional evidence, Your Honor.

16 THE COURT: All right. Well, then, Mr. Morris, did
17 you have anything in rebuttal?

18 MR. MORRIS: No, Your Honor. I think we can proceed
19 to closing statements. I would just appreciate confirmation
20 by the Objecting Parties that they rest.

21 THE COURT: All right. Well, I guess we'll get that
22 clear if it is isn't clear. All of the Objectors rest.
23 Confirm, yes, Mr. Rukavina?

24 MR. RUKAVINA: Confirm.

25 THE COURT: And Mr. Taylor?

1 MR. TAYLOR: Confirmed, Your Honor.

2 THE COURT: Okay. And Draper and Drawhorn?

3 MR. DRAPER: Yes, Your Honor.

4 MS. DRAWHORN: Confirmed, Your Honor.

5 THE COURT: All right. By the way, I assume Mr.
6 Dondero has been participating this morning. I didn't
7 actually get that clarification before we started. Mr.
8 Taylor, is he there with you this morning?

9 MR. TAYLOR: Your Honor, he is. He has been
10 participating. He is sitting directly to my left about
11 slightly more than six feet apart.

12 THE COURT: Okay. All right. Good.

13 All right. Well, let's talk about our closing arguments
14 and let me figure out, do we have -- should we break a bit
15 before starting? I have an idea in my brain about a time
16 limitation, but before I do that, let me ask. Mr. Morris,
17 first I'll ask you. How much time do you think you need for a
18 closing argument?

19 MR. MORRIS: Your Honor, --

20 MR. POMERANTZ: Your Honor?

21 MR. MORRIS: -- I'll defer to Mr. Pomerantz, who's
22 going to deliver that portion of our presentation today.

23 THE COURT: All right. Mr. Pomerantz?

24 MR. POMERANTZ: Your Honor, I will be making -- yes,
25 Your Honor. I will be making the majority portion of the

1 argument. Mr. Kharasch will be making the portion of the
2 argument dealing with the Advisor and Funds' objection. But I
3 expect my closing to be quite lengthy, given the 1129
4 requirements, all the legal issues, which I plan to spend a
5 fair amount of time. So I would anticipate a range of an hour
6 and 45 minutes.

7 THE COURT: An hour and 45 minutes? All right.
8 Well, --

9 MR. POMERANTZ: Correct.

10 THE COURT: I'm getting an echo.

11 MR. CLEMENTE: Your Honor, it's Matt Clemente on
12 behalf on the Committee. I'll have 15 minutes or less, Your
13 Honor. Just some things I would like to touch on.

14 THE COURT: All right. So, two hours. If I were to
15 --

16 MR. POMERANTZ: And then you need, Your Honor, to add
17 Mr. Kharasch. I think he's on. He can indicate how long his
18 part of the closing will be.

19 THE COURT: Mr. Kharasch?

20 MR. KHARASCH: Yes. I would figure my argument would
21 probably be about 20 minutes to 30 minutes.

22 THE COURT: Okay.

23 MR. RUKAVINA: Your Honor, let me interject something
24 that I think will help everyone out. With the CLOs having
25 consented through their counsel to the assumption, the bulk of

1 my objection is now moot. We no longer can and will argue
2 that the contracts are unassignable under 365(b) or (c)
3 because we do have now their consent. So that will hopefully
4 help the Debtor on that issue.

5 MR. KHARASCH: Your Honor, Ira Kharasch again. I was
6 not anticipating that. I believe that that will take away the
7 bulk of my argument. I'm still going to be dealing with some
8 of the other non-assumption-type arguments raised by the CLO
9 Objectors, kind of dovetailing with Mr. Pomerantz's arguments
10 on the injunction. But that will greatly reduce, Your Honor,
11 my argument.

12 THE COURT: All right. So if I say two hours of
13 argument for the Debtor and Creditors' Committee, Rukavina,
14 Taylor and Draper and Drawhorn, can you collectively manage to
15 share that two hours? Have a two-hour argument in the
16 aggregate? That seems fair to me.

17 MR. RUKAVINA: Your Honor, I think -- I think that's
18 fine, Your Honor.

19 THE COURT: All right. And I guess I'll --

20 MR. TAYLOR: This is Mr. Taylor. And yes, I agree.

21 THE COURT: Okay. And Mr. Draper?

22 MR. DRAPER: This is Douglas Draper. I agree. I
23 agree also, Your Honor.

24 THE COURT: All right. And I'm going to ask --

25 MR. POMERANTZ: Your Honor, I --

1 THE COURT: Go ahead.

2 MR. POMERANTZ: Your Honor, we -- I think we may need
3 like two hours and ten minutes, because mine was 1:45, Mr.
4 Clemente was 15, and then Mr. Kharasch. But we'll be around
5 that. And I tend to speak fast, so I might even shorten mine.

6 THE COURT: Okay. You negotiated me up to two hours
7 and ten minutes, Debtors/Objectors, each.

8 I'm going to ask one more time. The U.S. Trustee lobbed a
9 written objection, but we've not heard anything from the U.S.
10 Trustee. Are you out there wanting to make an oral argument?

11 MS. LAMBERT: Yes, Your Honor. The United States
12 Trustee is on the line. And we've been listening to the
13 hearing. I can turn my video on. I think you're --

14 THE COURT: Yes. I can hear you. I can't see you.

15 MS. LAMBERT: Okay. All right. And so the U.S.
16 Trustee feels that the issues about the releases have been
17 adequately joined and raised by the other parties and that
18 it's an issue of law. The U.S. Trustee does not feel that we
19 can add to that dialogue by, you know, wasting more of the
20 Court's time. I think it's been adequately briefed and it's
21 been adequately argued here today.

22 THE COURT: Okay.

23 MS. LAMBERT: And we do have an agreement to include
24 governmental release language in the order. I understand that
25 agreement is still being honored. That's a separate agreement

1 than the issue of whether the releases are precluded. But
2 we're going to let the other people carry the water on that.

3 THE COURT: Okay.

4 MR. POMERANTZ: Yeah. And that is correct. That is
5 correct, Your Honor. They asked for some information -- a
6 provision on government releases. They also asked for a
7 provision regarding joint and several liability for Trustee
8 fees.

9 As I mentioned previously, the IRS has asked for a
10 provision in the confirmation order, as have the Texas Taxing
11 Authorities.

12 We have not uploaded a proposed confirmation order, but I
13 will state right now on the record that, before we do so, we
14 will, of course, give Ms. Lambert, Mr. Adams, and the Texas
15 Taxing Authorities the opportunity to review. We expect there
16 won't be any issue because the language has already been
17 agreed to.

18 THE COURT: All right. Well, how about this. It's
19 11:23 Central time. Let's break until 12:00 noon Central
20 time, okay, so that gives everyone a little over 30 minutes to
21 have a snack and get their notes together, and we'll start
22 with closing arguments at 12:00 noon. All right? So we're in
23 recess until then.

24 THE CLERK: All rise.

25 (A recess ensued from 11:24 a.m. until 12:05 p.m.)

1 THE COURT: All right. Please be seated. All right.
2 This is Judge Jernigan. We are back on the record in
3 Highland. Let me make sure we have the people we need. Do we
4 have the Pachulski team there? Mr. Pomerantz, Mr. Kharasch?

5 MR. POMERANTZ: Yes, you do, Your Honor.

6 THE COURT: All right. For our Objectors, Mr.
7 Taylor, are you there?

8 MR. TAYLOR: Yes, Your Honor, I am.

9 THE COURT: All right. I see Mr. Draper there on the
10 video. You're there.

11 MR. DRAPER: I'm here. Can you hear me?

12 THE COURT: I can hear you loud and clear, yes.

13 MR. DRAPER: Great, because I didn't -- I'm not
14 hearing, something so I apologize.

15 THE COURT: All right. So we have Mr. Rukavina, and
16 I think I see Mr. Hogewood there as well. Is that correct?
17 You're ready to go forward?

18 MR. RUKAVINA: Yes, Your Honor.

19 THE COURT: All right.

20 MR. RUKAVINA: Yes, Your Honor. Good afternoon.

21 THE COURT: All right. And Ms. Drawhorn, you're
22 there?

23 MS. DRAWHORN: Yes, Your Honor.

24 THE COURT: Okay. Committee. Mr. Clemente, are you
25 there?

1 MR. CLEMENTE: Yes, Your Honor. I'm here, Your
2 Honor.

3 THE COURT: Okay. Very good. All right. So, let me
4 reiterate. We've given two-hour and 10-minute time
5 limitations for the Debtor, and that'll be both any time you
6 reserve for rebuttal and your closing, initial closing
7 argument. Mr. Clemente, you're going to be in that time frame
8 as well. Okay?

9 MR. CLEMENTE: Yes, Your Honor.

10 THE COURT: And so, as supporters of the plan.

11 And then, of course, the Objectors, they have collectively
12 two hours and ten minutes.

13 A couple of things. I'm going to have my law clerk, Nate,
14 who you can't see but he's to my right, he's going to keep
15 time. I promise I won't be a jerk and cut anyone off
16 midsentence, but please don't push the limit if I say, you
17 know, "Time."

18 The other thing I will tell you is I'll probably have some
19 questions here or there. And I've told Nate, cut off the
20 timer if we're in a question-answer session. I won't count
21 that as part of the two hours and ten minutes.

22 All right. So, with that, Mr. Pomerantz, you may begin.

23 CLOSING STATEMENT ON BEHALF OF THE DEBTOR

24 MR. POMERANTZ: Thank you, Your Honor. As Your Honor
25 is aware, the Debtor has been able to resolve all objections

1 to confirmation other than the objection by Mr. Dondero or his
2 entities and the United States Trustee.

3 Your Honor, I have a very lengthy closing argument, given
4 the number of issues that are raised in the objections, and I
5 want to make a complete record, since I understand that
6 there's a good likelihood that (garbled) appeal.

7 With that in mind, Your Honor, I'm prepared to go through
8 each and every confirmation requirement in Section 1129.
9 However, as an alternative, I might propose that I can go
10 through each of the Section 1129 requirements that are the
11 subject of pending objections or otherwise depend upon
12 evidence that Your Honor has heard.

13 THE COURT: Okay.

14 MR. POMERANTZ: And of course, I'll be happy to
15 answer any questions that you have in the process.

16 THE COURT: Okay.

17 MR. POMERANTZ: And after my closing argument, I will
18 turn it over to Mr. Kharasch to address the Advisor and Funds'
19 objections.

20 THE COURT: Okay.

21 MR. POMERANTZ: Before I walk the Court through the
22 confirmation requirements, I did want to note for the Court,
23 as I did previously, that we filed an updated ballot summary
24 at **Docket No. 1887**. And as reflected in the summary, Classes
25 2 and 7 have voted to accept the plan with the respective

1 numerosity and amounts required. In fact, the votes are a
2 hundred percent.

3 Class 8, however, has voted to reject the plan. Seventeen
4 creditors in Class 8 voted yes and 24 objectors, which are, I
5 think, all but one the employees with one-dollar claims for
6 voting purposes, voted against.

7 In dollar amount, Class 8 has accepted the plan by 99.8
8 percent of the claims. And I will address the issues of the
9 cram-down over that class a little bit later on.

10 Lastly, during the course of my presentation, I will
11 identify for the Court certain modifications we have made to
12 address the objections that were filed on January 22nd and
13 then also on February 1st. And at the end of my presentation,
14 I will raise a couple of other modifications that I won't get
15 to during my presentation and will explain to the Court why
16 all the modifications do not require resolicitation and are
17 otherwise appropriate under Section 1127.

18 Your Honor, as Your Honor is aware, Section 1129 requires
19 the Debtors to demonstrate to the court that the plan
20 satisfies a number of statutory requirements. 1129(a)(1)
21 provides that the plan requires -- complies with all statutory
22 provisions of Title 11, and courts interpreted this provision
23 as requiring the debtor to demonstrate it complies with
24 Section 1122 and 1123.

25 With respect to classification, Your Honor, there has been

1 one objection that was raised to essentially a classification,
2 and that was raised by Mr. Dondero to Article 3C of the plan
3 on the grounds that it purports to eliminate a class that did
4 not have any claims in it as of the effective date but which
5 may later have a claim in that class.

6 I think he was primarily concerned about Class 9
7 subordinated claims. But Mr. Dondero misunderstands the
8 provision. It only eliminates a claim for voting purposes,
9 and if there's later a claim in that class, it will be treated
10 as the plan provides the treatment.

11 In any event, Class 9, as we know now, will be populated
12 by the HarbourVest claims, as well as the UBS claims and the
13 Patrick Daugherty claims, if the Court approves the settlement
14 approving those claims.

15 Next, Your Honor, Section 1123(a) contains seven mandatory
16 requirements that a plan must include. Sections 1, 2, and 3
17 of 1123(a) apply to the classification of claims and where
18 they're impaired and treatment. The plan does that.

19 There has been an objection to 1123(a)(3) raised by
20 several parties with respect to the classification and
21 treatment of subordinated claims. The concerns stem from the
22 mistaken belief that the Debtor reserved the right to
23 subordinate claims without providing parties with notice and
24 without obtaining a court order.

25 The Debtor never intended to have unilateral ability to

1 subordinate claims without affording parties due process
2 rights, and we've added some clarificatory language to so
3 provide.

4 We made changes to the plan on January 22nd, and then on
5 February 1st, and the plan addresses all those issues in
6 Article 3(j) and it talks about when a claim is going to be
7 subordinated as a non-creditor. We've also redefined the
8 definition of subordinated claims to make clear that a claim
9 is only subordinated upon entry of an order subordinating that
10 claim.

11 Mr. Dondero also objected on the grounds that the plan did
12 not contain a deadline pursuant to which the Debtor would be
13 required to seek any subordination, and we have revised
14 Article 7(b) of the plan to provide that any request to
15 subordinate a claim would have to be made on or before the
16 claim objection deadline, which is 180 days after the
17 effective date.

18 Lastly, certain former employees, Mr. Yang and Borud,
19 objection also joined by Mr. Deadman, Travers, and Kauffman,
20 objected to the inclusion of language in the definition of
21 "Subordinated Claims" that a claims arising from a Class A, B,
22 or C limited partnership is deemed automatically subordinated.
23 The concerns were that the language could broadly apply to any
24 potential claims by a former partner, and could be also read
25 to encompass claims outside the statutory scope of 510(b) or

1 otherwise relating to limited partnership interests.

2 While the Debtor does reserve the right to seek to
3 subordinate the claims on any basis, we have modified the plan
4 to address that concern and to address the concern that we're
5 not attempting to create any new causes of action for
6 subordination that don't otherwise exist under applicable law,
7 but it just preserves the parties' rights with respect to
8 subordination and deals with that at a later date.

9 Next, Your Honor, Section 1123(a)(5). I skipped over
10 1123(a)(4) because there are no objections to that provision.

11 THE COURT: Okay.

12 MR. POMERANTZ: Section 1123(a)(5), a plan must
13 provide for adequate means of implementation. And the plan
14 provides a detailed structure and blueprint how the Debtor's
15 operations will continue, how the assets will be monetized,
16 including the establishment of the Claimant Trust,
17 establishment of the Litigation Sub-Trust, the Reorganized
18 Debtor, the Claimant Trust Oversight Board. And the documents
19 precisely describing how this will occur were filed as part of
20 the various plan supplements.

21 1123(a)(7), Your Honor, requires that the plan only
22 contain provisions that are consistent with the interest of
23 equity holders and creditors with respect to the manner,
24 selection, and -- of any director, officer, or trustee under
25 the plan. And as discussed in the plan, at the disclosure

1 statement, and as testified to by Mr. Seery, the Committee and
2 the Debtor had arm's-length negotiations regarding the post-
3 effective date corporate governance and believe that the
4 selection of the claimant Trustee, the Litigation Sub-Trustee,
5 and the Claimant Trust Oversight Board are in the best
6 interest of stakeholders.

7 HCMFA has raised a particular objection, I think, to these
8 issues, but I will address it in the context of the
9 requirement under Section 1129(a)(5).

10 Your Honor, Section 1129(a)(2) requires that the plan
11 comply with the disclosure and solicitation requirements under
12 the plan. Section 1125 requires that the Debtor only solicit
13 with a court-approved disclosure statement. The Court
14 approved the disclosure statement on November 23rd, and
15 pursuant to the proofs of service on file, the plan and
16 disclosure statement were mailed, along with solicitation
17 materials that the court approved.

18 Now, there has been an objection raised by Dugaboy, and
19 also alluded to by Mr. Taylor in some of his comments before,
20 that the plan does violate 1129(a)(2) because the Debtor's
21 disclosure statement was deficient.

22 In support of that argument, Dugaboy points to the
23 reduction in the anticipated distribution to creditors from
24 the November plan analysis to the January plan analysis, and
25 argues that that reduction requires resolicitation. However,

1 those arguments are not well-taken.

2 First, none of the people making these objections were
3 solicited for their vote on the plan, or if they had been,
4 they didn't vote or decided to reject the plan. And to the
5 extent that Class 8 creditors, the distribution has gone down
6 -- that's the class that Mr. Taylor and Mr. Draper are
7 concerned about -- you don't hear the Committee, Acis,
8 Redeemer, UBS, HarbourVest, Daugherty, or the Senior Employees
9 making their argument, this argument, and they represent over
10 99 percent of the claims in that class. And in fact, of the
11 17 Class 8 creditors that have accepted the plan, 15 are
12 represented by the parties I just mentioned.

13 So who are the two creditors that they're so concerned
14 about? One is Contrarian, which is a claims trader that
15 actually elected to be treated in Class 7, and one is one of
16 the employees who voted to accept the plan.

17 Second, Your Honor, the argument conflates the difference
18 between adverse change to the treatment of a claim or interest
19 that would require a resolicitation under Section 1127 and a
20 change to the distribution that would not.

21 More importantly, Your Honor, the argument is specious.
22 As Mr. Seery testified yesterday, the material differences
23 between the analysis contained on November and late January
24 and the one we filed on February 1st were based on three types
25 of changes: an update regarding the increased value of assets

1 based upon events that had transpired during this period,
2 which included an increase in asset value, no recoveries, and
3 revenues expected to be generated by the CLO management
4 agreements; an update to the expected costs of the Reorganized
5 Debtor and the Claimant Trust as a result of the continued
6 evaluation of staffing needs, operational expenses, and
7 professional fees; and an update to reflect resolution of the
8 HarbourVest and UBS claims.

9 In the filing Monday, Your Honor, we updated the plan
10 projection, a liquidation analysis which revised the unsecured
11 claims based upon the UBS settlement that I was able to
12 disclose to Your Honor. And in the filing, the distribution
13 now revised to Class 8 creditors is now 71 percent, compared
14 to the 87 percent that was in the disclosure statement that
15 went out for solicitation.

16 Your Honor, there can be no serious argument that the
17 creditors in this case were not fully aware of the potential
18 for the UBS and HarbourVest creditors receiving claims. Your
19 Honor's UBS 3018 order granting its claim for voting purposes
20 was entered right around the time that the disclosure
21 statement was approved. And, in fact, a last-minute addition
22 to the disclosure statement disclosed the 3018 amount,
23 although the amount did not make it to the attachment to the
24 disclosure statement. And that reference, Your Honor, to the
25 UBS claim being allowed for voting purposes can be found at

1 Page 41 of Docket No. 1473.

2 And the HarbourVest settlement was filed on about December
3 23, two weeks before the voting deadline, sufficient time for
4 people to take that into consideration.

5 And as Your Honor surely knows, the hearings in this case
6 have been very well-attended by the major parties, and I
7 believe that if we went back and looked at the records of who
8 was on the WebEx system during the HarbourVest and UBS
9 hearings, you would find that representatives of basically
10 every creditor, every major creditor in this case in Class 8
11 participated.

12 Moreover, Your Honor, creditors were not guaranteed any
13 percentage recovery under the plan and disclosure statement,
14 which clearly identified the size of the claims pool as a
15 material risk.

16 Article 4(a)(7) of the disclosure statement, which is at
17 Docket 1473, is entitled "Claims Estimation" and warns
18 creditors that there can be no assurances that the Debtor's
19 claims estimates will prove correct, and that the actual
20 amount of the allowed claims may vary materially.

21 And if Dugaboy is arguing it was misled as the holder of a
22 disputed administrative claim and general unsecured claim,
23 that argument is simply preposterous.

24 Dugaboy cites several cases for the proposition that
25 deficient disclosure may warrant resolicitation, and the

1 Debtor agrees with the proposition as a general matter. But
2 if one looks at the cases that were filed -- that Dugaboy
3 cited to, it will see that they are clearly inapposite and
4 distinguishable.

5 *In re Michaelson*, the Bankruptcy Court for the Eastern
6 District of California, revoked confirmation because the
7 debtor failed to disclose in the disclosure statement a mail
8 fraud indictment of the turnaround specialist who was to lead
9 the reorganization effort and a prior Chapter 7 company he
10 drove into the ground.

11 In *In re Brotby*, the Ninth Circuit BAP affirmed a decision
12 of the Bankruptcy Court that the individual debtor's decision
13 to modify its financial projections on the eve of confirmation
14 did not require a resolicitation. And there, the financial
15 projections were off by 75 percent.

16 And in *Renegade Holdings*, the Bankruptcy Court granted a
17 motion by a group of states to revoke confirmation by the
18 debtors, who manufactured and distributed tobacco products,
19 because the debtors failed to disclose in its disclosure
20 statement that the debtor and its principals were under
21 criminal investigation for unlawful trafficking in cigarettes,
22 which was not disclosed to creditors.

23 Your Honor, none of these cases are remotely analogous to
24 this case, and they certainly do not stand for the proposition
25 that the Debtor was required to resolicit.

1 Next, Your Honor, the next requirement is 1129(a)(3),
2 which requires that any plan be proposed in good faith. As
3 Mr. Seery testified at length, and the Court has personal
4 knowledge of, having presided over this case for a year, the
5 plan is the result of substantial arm's-length negotiations
6 with the Committee over a period of several months.

7 Mr. Seery testified yesterday that, soon after the board
8 was appointed, the Committee wanted to immediately pursue down
9 the path of an asset monetization plan. However, as Mr. Seery
10 testified, the board decided that it was inappropriate to rush
11 to judgment and that it should consider all potential
12 restructuring alternatives for the Debtor. And Mr. Seery
13 testified what those alternatives were: a traditional
14 restructuring and continuation of the Debtor's business; a
15 potential sale of the Debtor's assets in one or more
16 transactions; an asset monetization plan like the one before
17 the Court today; and, last but not least, a grand bargain plan
18 that would involve Mr. Dondero sponsoring the plan with a
19 substantial equity infusion.

20 As Mr. Seery testified, by the early summer of 2020, the
21 Debtor decided that it was appropriate to start moving down
22 the path of an asset monetization plan while it continued to
23 work on the grand bargain plan. Accordingly, Mr. Seery
24 testified that the Debtor commenced good-faith negotiations
25 with the Committee regarding the asset monetization plan, and

1 that those negotiations took several months, were hard-fought
2 and at arm's-length, and involved substantial analysis of the
3 appropriate post-confirmation corporate structure, governance,
4 operational, regulatory, and tax issues. And on August 12th,
5 Your Honor, the plan was filed with the Court.

6 And although the Debtor at that time had not reached an
7 agreement with the Committee on some of the most significant
8 issues, Mr. Seery testified that the independent board
9 believed that it was important to file that plan at that time,
10 a proverbial stake in the ground to act as a catalyst for
11 reaching a consensual plan with the Committee or others, which
12 it has done.

13 As Mr. Seery testified, he continued to work with Mr.
14 Dondero to try to achieve a grand bargain plan, while at the
15 same time proceeding down the path of the filed plan.

16 He testified that the parties participated in mediation at
17 the end of August and early September to try to reach an
18 agreement on a grand bargain plan, but were unsuccessful. And
19 the Debtor proceeded on the path of the August 12th plan and
20 sought approval of its disclosure statement on August 27th,
21 2020.

22 Mr. Seery testified that, at that time, the Debtor still
23 had not reached an agreement with the Committee on certain
24 significant issues involving post-confirmation governance and
25 the scope of releases. And as a result, after a contested

1 hearing, Your Honor, Your Honor did not approve the disclosure
2 statement on October 27th, but asked us to go back again to
3 try to work out the issues, and we came back on November 23rd.

4 Mr. Seery testified that the Debtor continued to negotiate
5 with the Committee to resolve the material disputes leading --
6 which led up to the November 23rd hearing, where we came in
7 with the support of the Committee. But as Mr. Seery has also
8 testified, he has continued to try to reach a consensus on a
9 global plan, notwithstanding the approval of the disclosure
10 statement. And he spent personally several hundred hours
11 since his appointment trying to build consensus.

12 As part of this process, Mr. Seery testified that Mr.
13 Dondero received access to substantial information regarding
14 the Debtor's assets and liabilities, most recently in
15 connection with a series of informal document requests which
16 were made at the end of December.

17 And after the Court asked the parties to again reengage in
18 efforts to try to reach a global hearing after the Debtor's
19 preliminary injunction motion, Mr. Seery testified that he and
20 the board participated in calls with Mr. Dondero and his
21 advisors and the Committee to see if common ground could be
22 attained.

23 Unfortunately, as Mr. Seery testified, the Committee and
24 Mr. Dondero were not able to reach an agreement.

25 Accordingly, Your Honor, the testimony unequivocally and

1 overwhelmingly demonstrates that the plan was proposed in good
2 faith.

3 I expect the Objectors may argue in closing that they have
4 filed a plan under seal that is a better alternative than that
5 being proposed by the plan that the Debtor seeks to confirm.
6 Your Honor, as a threshold matter, yesterday I said any
7 mention of the specifics of the recent plan would be
8 inappropriate. We are not here today to debate the merits of
9 Mr. Dondero's plan, which the Court permitted him to file
10 under seal. He had ample opportunity to file this plan after
11 exclusivity was terminated, seek approval of a disclosure
12 statement, and, if approved, solicit votes in connection with
13 a confirmation hearing, but he failed to do so.

14 What matters today, Your Honor, is whether the Debtor's
15 plan, the plan that has been accepted by 99.8 percent of the
16 amount of creditors, and opposed only by Mr. Dondero, his
17 related entities, and certain employees, meets the
18 confirmation requirements of Section 1129, which we most
19 certainly argue it does.

20 And perhaps most importantly, Your Honor, the Court
21 remarked at the last hearing that, without the Committee's
22 support for a competing plan, Mr. Dondero's plan would be dead
23 on arrival. And as you have heard from Mr. Clemente, Mr.
24 Dondero does not yet have the Committee's support.

25 Next, Your Honor, is Section 1129(a)(5). That requires

1 that the plan disclose the identity of any director,
2 affiliate, officer, or insider of the debtor, and such
3 appointment be consistent with the best interest of creditors
4 and equity holders. Courts have held that this section
5 requires the disclosure of the post-confirmation governance of
6 the reorganized entity.

7 HCMFA objects to the plan, arguing that it did not comply
8 with Section 1129(a)(5) because it didn't disclose the people
9 who would control and manage the Reorganized Debtor and who
10 might be a sub-servicer. HCMFA's objection is off-base.
11 Under the plan, Mr. Seery will be the claimant Trustee and
12 Marc Kirschner will be the Litigation Trustee. Mr. Seery
13 testified extensively about his background, and he has
14 appeared before the Court many times and the Court is familiar
15 with him. We have also introduced his C.V. into evidence.

16 As he testified, he will be paid \$150,000 per month,
17 subject to further negotiations with the Claimant Trust
18 Oversight Committee regarding the monthly amount and any
19 success fee and severance fee, which negotiation is expected
20 to be completed within the 45 days following the effective
21 date.

22 Mr. Seery also testified regarding the names of the
23 members of the Claimant Trust Oversight Committee, which
24 information was also contained in the plan supplement and it
25 generally includes the four members of the Committee and David

1 Pauker, a restructuring professional with decades of
2 restructuring experience.

3 The members of the Oversight Committee will serve without
4 compensation, except for Mr. Pauker, who Mr. Seery testified
5 will receive \$250,000 in the first year and \$150,000 for
6 subsequent years.

7 As set forth in the Claimant Trust agreement, if at any
8 time there is a vacant seat to be filled by another
9 independent member, their compensation will be negotiated by
10 and between the Claimant Trust Oversight Board and them.

11 Mr. Seery has also testified that he believed the Claimant
12 Trust will have sufficient personnel to manage its business.
13 Specifically, he has testified that he intends to employ
14 approximately ten of the Debtor's employees, who will be
15 sufficient to enable him to continue to operate the Debtor's
16 business, including as an advisor to the managed funds and the
17 CLOs, until the Claimant Trust is able to effectively and
18 efficiently monetize its assets for fair value, whether that
19 takes two years or whether that takes 18 months or whether
20 that takes longer.

21 Mr. Seery further testified that he believes that the
22 operations can be best conducted by the Debtor's employees.
23 And while he did consider the retention of a sub-servicer, he
24 ultimately decided, in consultation with the Committee, that
25 the monetization would be a lot more effective if done with a

1 subset of the Debtor's current employees.

2 The proposed corporate governance is also consistent with
3 the interests of the Debtor and its stakeholders. The Court
4 is very familiar with Mr. Seery and the Debtor, and I believe
5 that Mr. Clemente, when he comments, will say the Committee
6 can think of no better person to continue managing the
7 Claimant Trust than Mr. Seery.

8 Mr. Kirschner is also well qualified to be the Litigation
9 Trustee. His C.V. is part of the evidence that's been
10 admitted and contains additional information regarding his
11 background. And he will receive \$40,000 a month for the first
12 three months and \$20,000 a month thereafter, plus a to-be-
13 negotiated success fee.

14 There just simply can be no challenge to Mr. Seery's or
15 Mr. Kirschner's qualifications or abilities to act in a manner
16 contemplated by the plan or that their involvement is not in
17 the best interest of the estate and its creditors.

18 Your Honor, the next requirement that is objected to is
19 Section 1129(a)(7). That, of course, requires the Debtor to
20 demonstrate that creditors will receive not less under the
21 plan than they would receive if the Debtor was to be
22 liquidated in Chapter 7. And on February 1st, Your Honor, we
23 filed our updated liquidation analysis, which contains the
24 latest-and-greatest evidence to support that.

25 These documents, the updated documents, in connection with

1 the prior analysis, was provided to objecting parties in
2 advance of the January 29th deposition, and Your Honor has
3 heard the differences between the January 29th and the
4 February 1st documents being very minimal.

5 The Court heard extensive evidence and testimony from Mr.
6 Seery regarding the assumptions that went into the preparation
7 of the liquidation analysis and the differences of what
8 creditors are projected to receive under the plan as compared
9 to what they are projected to receive in a Chapter 7.

10 Such testimony also included a comparison between the
11 liquidation analysis that was filed with the plan in November,
12 the updated liquidation analysis filed on the -- or, provided
13 to parties on January 28th, and the last version, filed on
14 February 1st.

15 Mr. Seery testified that, on the revenue side, the
16 liquidation analysis was updated to include the HCLOF
17 interest, which was required as part of the settlement with
18 HarbourVest; the increase in value of certain assets,
19 including Trussway; revenue expected to be generated from
20 continued management of the CLOs; and increased recovery on
21 notes as a result of the acceleration of certain related
22 notes.

23 On the expense side, Mr. Seery testified regarding his
24 best estimate of the likely expenses to be incurred by a
25 Chapter 7 trustee -- by the Claimant Trust, including

1 personnel costs; professional costs, which increase because of
2 the litigious nature this case has become; and operating
3 expenses.

4 And lastly, on the claim side, Your Honor, Mr. Seery
5 testified that the claims numbers have been updated to include
6 the settlement from HarbourVest and initially the amount
7 approved to UBS pursuant to the 3018 order and then the
8 reduction at \$50 million based upon the settlement announced.
9 And like the prior liquidation analysis, the current analysis
10 demonstrates that creditors will fare substantially better
11 under in Chapter -- under the plan than in Chapter 7. In
12 fact, the projected recovery under the plan is 85 percent for
13 Class 7 creditors and 71.32 percent for Class 8 creditors, as
14 compared to 54.96 percent for all unsecured creditors in a
15 Chapter 7.

16 Mr. Seery also testified that expenses are expected to be
17 more under Chapter 11 than under Chapter 7, but he also
18 testified that the tens of millions of dollars in greater
19 revenue and asset recoveries under the plan will more than
20 offset the additional expenses.

21 As a result, the Court has more than sufficient
22 evidentiary basis to conclude that the Debtor has carried its
23 burden to prove that it meets the best interest of creditors
24 best.

25 But Mr. Dondero's counsel spent a lot of time crossing --

1 cross-examining Mr. Seery, in a vain attempt to demonstrate to
2 the Court that a Chapter 7 actually would be much better for
3 creditors. And this argument has also been made by Dugaboy
4 and the Advisors and the Funds.

5 Before I address these arguments on its merits, Your
6 Honor, I just wanted to remind the Court of the Objectors --
7 these Objectors' interest in this case. Mr. Dondero owns no
8 equity in the Debtor. He owns a general partner. Strand, in
9 turn, owns a quarter-percent -- a quarter of one percent of
10 the total equity in the Debtor. And Mr. Dondero's claim, it's
11 only a claim for indemnification. Dugaboy asserts two claims:
12 a frivolous administrative claim relating to the postpetition
13 management of a Multi-Strat, which, as an administrative
14 claim, if it's valid, would not even be affected by the best
15 interest of creditors test, because it would have to be paid
16 in full. And he also asserts a claim that the Debtor's
17 subsidiary -- against the Debtor's subsidiary for which it
18 tries to pierce the corporate veil.

19 Just think about it. Dugaboy, Mr. Dondero's entity, is
20 arguing that he should be able to pierce the corporate veil to
21 get at the entity that was his before the bankruptcy.

22 Dugaboy's only other interest in this case relates to a --
23 a one -- point eighteen and several-hundredths percent of the
24 equity interest of the Debtor, and that is out of the money.

25 And as I mentioned previously, Your Honor, Mr. Rukavina's

1 clients either didn't file any general unsecured claims or
2 filed them and withdrew them. Their only claim is a disputed
3 administrative claim against the Debtor that was filed a week
4 ago and which, at the appropriate time, the Debtor will
5 demonstrate is without merit.

6 And I understand that, just today, NexPoint Advisors also
7 filed administrative claim.

8 So I'm not going to argue to Your Honor that these parties
9 do not have standing, although their standing is tenuous, at
10 best, to assert this argument. The Court should keep their
11 relative interests in mind when evaluating the merits and the
12 good faith of this objection.

13 The principal objection, as I said, is that creditors will
14 do better in a Chapter 7. Essentially, they argue that a
15 Chapter 7 trustee can liquidate the assets just as well as Mr.
16 Seery can and not require the cost structure that is included
17 in the Debtor's plan projections. Yes, they argue that a
18 Chapter 7 will be more efficient.

19 Mr. Seery's testimony, the only testimony on the topic,
20 however, establishes that this preposterous proposition has no
21 basis in reality. Mr. Seery testified that a Chapter 7
22 trustee's mandate would be to reduce Debtor's assets as fast
23 as possible, while he will monetize assets as and when
24 appropriate to maximize the value.

25 But even if you can assume that the Chapter 7 trustee

1 could get court authority in a Chapter 7 to operate, there are
2 several reasons Mr. Seery testified why a liquidation by a
3 Chapter 7 trustee would be far worse than the plan.

4 First, Your Honor, no matter how competent the Chapter 7
5 trustee is -- and Mr. Seery did not say he is more competent
6 than anyone else out there -- the lack of a learning curve
7 that Mr. Seery established through the 13 months in this case
8 puts Mr. Seery at such a major advantage compared to a Chapter
9 7 trustee.

10 Second, Mr. Seery questioned whether the Chapter 7 trustee
11 would be able to retain the Debtor's existing professionals,
12 even assuming they were willing to be retained. I'm not sure
13 what's the Court's practice or the practice in the Northern
14 District, but in many districts around the country debtor's
15 counsel and professionals cannot be retained by Chapter 7
16 trustee, as general counsel, at least.

17 And I could just imagine, Your Honor, Mr. Dondero's
18 position if the Chapter 7 trustee actually sought to hire
19 Pachulski Stang and DSI.

20 Third, Your Honor, regardless of whether the Chapter 7
21 trustee obtained some operating authority, the market
22 perception will be that a Chapter 7 trustee will sell assets
23 for less value than would Mr. Seery as claimant Trustee. Mr.
24 Seery testified to that.

25 The argument that the Objectors make that a Chapter 7

1 process, whereby the trustee would seek court approval of
2 assets, is better for value than a process overseen by the
3 Claimant Trust Board lacks any evidentiary basis and also is
4 contradicted by Mr. Seery's testimony.

5 In fact, Mr. Seery testified that the Chapter 7 process,
6 the public process of it, would very likely result in less
7 recovery than a sale conducted in the Claimant Trust.

8 And lastly, Mr. Seery testified that it's unlikely that
9 the ten or so valuable employees who Mr. Seery is planning to
10 heavily rely on to assist him with post-confirmation would
11 agree to a work for Chapter 7 trustee. Your Honor is all too
12 familiar with the fights in the Acis case and Chapter 7
13 trustee, and it's just hard to believe that any of the
14 Highland employees would go work for the Chapter 7 trustee.

15 So why is Mr. Dugaboy -- why is Dugaboy and Mr. Dondero
16 actually making this objection and advocating for a Chapter 7?
17 It's because they would expect to buy the Debtor's assets on
18 the cheap from a Chapter 7 trustee, exactly what they've been
19 trying to do in this case.

20 Your Honor, moving right now to Section 1129(a)(11), that
21 requires the debtor to demonstrate that the plan is feasible.
22 In other words, it's not likely to be followed by a further
23 liquidation or restructuring. Under the Fifth Circuit law,
24 the debtor need only demonstrate that the plan will have a
25 reasonable probability of success to satisfy the feasibility

1 requirement, and the Debtor has easily met this standard.

2 As Mr. Seery testified, the Debtor's plan contemplates
3 continued operations through which time the assets will be
4 monetized for the benefit of creditors. The plan contemplates
5 that Class 7 creditors will be paid off shortly after the
6 effective date. Class 8 creditors are not guaranteed any
7 recovery but will receive pro rata distributions over a period
8 of time. Class 2, Frontier secured claim, will be paid off
9 over time, and the projections demonstrate that it will -- the
10 Debtor will have money to do so.

11 Mr. Seery testified at length regarding the assumptions
12 that went into the preparation of the projections most
13 recently filed on February 1, and based on that testimony, the
14 Debtor has clearly demonstrated that the plan is feasible.

15 Your Honor, I think that brings us to Section 1129(b). Of
16 course, again, Your Honor, if Your Honor has any other
17 questions with the sections I'm skipping over. I believe
18 we've adequately covered them in the briefs and I don't think
19 there's any objection.

20 But as I mentioned before, we have three classes that have
21 voted to reject the plan. Class 8 is the general unsecured
22 claims. They voted to reject the plan. Yes. Even though,
23 based upon the ballot summary, 99 percent of the amount of
24 claims in that class voted to accept the plan, approximately
25 24 employees voted to reject the plan. And accordingly, the

1 Debtor cannot satisfy the numerosity requirement of Section
2 1126(c).

3 I do want to briefly recount for Your Honor Mr. Seery's
4 testimony regarding the nature of the claims of the 24
5 employees who voted to reject the plan. And I'm not doing
6 this to argue that the votes from these contingent creditors
7 are not valid or that the Debtor doesn't need to satisfy the
8 cram-down requirements. The Debtor understands it needs to
9 demonstrate to the Court that Section 1129(b) is satisfied for
10 the Court to confirm the plan.

11 Rather, why I do this, Your Honor, is to provide the Court
12 with context about the nature and extent of the creditors in
13 this class as the Court determines whether the plan is, in
14 fact, fair and equitable and can be crammed down to a
15 dissenting vote.

16 Mr. Seery testified that these employees originally had
17 claims under the annual bonus plan and the deferred
18 compensation plan. And as he testified, in order for claims
19 under each of those plans to vest -- I think he referred to
20 them as be-in-the-seat plans -- the employee was required to
21 remain employed as of that date.

22 Mr. Seery testified that the Debtor terminated the annual
23 bonus plan in the middle of January and replaced it with the
24 key employee retention plan that the Court previously
25 approved.

1 Accordingly, Mr. Seery testified that no employee who
2 voted to reject the plan anymore has a claim on the annual
3 bonus plan. He also testified that, with respect to the
4 deferred compensation plan, people have contingent claims
5 under that plan and that no payments are due until May 20 --
6 2021.

7 As Mr. Seery testified, if the employees who would be
8 entitled to receive payments under the deferred compensation
9 plan do not agree to enter into a separation agreement that
10 was approved by the Court, they will be terminated before May
11 and there will no -- not longer be any deferred compensation
12 due.

13 Accordingly, while the 24 employees who voted to reject
14 the plan do technically have claims at this time they have
15 voted, Mr. Seery testified the claims will go away soon.

16 I do want to point out something that's obviously
17 painfully obvious at this point, that while Class 8 voted to
18 reject the plan, the Committee, the statutory fiduciary for
19 all unsecured creditors, supports the plan enthusiastically
20 and I believe it does so unanimously.

21 The other classes to reject the plan, Your Honor, are
22 Class 11, the A limited partnerships, and none of the holders
23 in Class B and C limited partnerships voted on the plan, so
24 cram-down is required over those classes as well. So Your
25 Honor is able to confirm the plan pursuant to the cram-down

1 procedures under 1129(b) if the Court determines that the plan
2 is fair and equitable and does not discriminate unfairly
3 against the rejecting classes.

4 Let's first turn to the fair and equitable requirement. A
5 plan is fair and equitable if it follows the absolute priority
6 rule, meaning that if a class does not receive payment in
7 full, no junior class will receive anything under the plan.
8 With respect to Class 8, no junior class -- junior class to
9 Class 8 will receive payment, and here is the key point,
10 unless Class 8 is paid in full, with appropriate interest.
11 NPA and Dugaboy -- Dugaboy in a brief filed on Monday -- argue
12 that the plan does not satisfy the absolute priority rule
13 because Class 10 and Class Equity Interests have a contingent
14 right to receive property under the plan.

15 Your Honor, this argument misunderstands the absolute
16 priority rule. Class 10 and Class Creditors will only receive
17 payment after distribution to 8 and 9, the unsecured claims
18 and the subordinated claims, are all paid in full, plus
19 interest.

20 And, in fact, Dugaboy, in its brief, to its credit, admits
21 that the argument is contrary to the Bankruptcy Court's
22 decision of Judge Gargotta in the Western District case of *In*
23 *re Introgen Therapeutics*. There, the Court was faced with a
24 similar argument by a group of unsecured creditors who argued
25 that the debtor's plan violated the absolute priority rule

1 because equity was retaining a contingent interest that would
2 only be payable if general unsecured claims were paid in full.

3 In rejecting the argument, the Court reasoned, and I
4 quote, "The only way Class 4 will receive anything is if Class
5 3, in fact, gets paid in full, in satisfaction of
6 1129(b) (2) (B) (i)," meaning that the absolute priority rule
7 would not be an issue. If Class 3 is not paid in full, Class
8 4's property interest is not -- is just -- is not just
9 valueless, it just doesn't exist.

10 Your Honor, this is precisely the situation in this case.
11 Equity interests will only receive a recovery if Class 8 and 9
12 are paid in full.

13 But Dugaboy attempts to escape the logical reading of the
14 absolute priority rule by claiming that *Introgen* was wrongly
15 decided and goes against the Supreme Court's decision in
16 *Ellers* (phonetic). Dugaboy argues that because the Supreme
17 Court decided that property given to a junior class without
18 paying a senior class in full is property, even if it's
19 worthless.

20 But Dugaboy misses the point. Like the debtor in the
21 *Introgen*, the Debtor here is not arguing that the property --
22 the absolute priority rule is not violated because the
23 contingent trust is worthless. Rather, the argument is that
24 the absolute priority rule is not violated; it's, in order to
25 receive anything on account of the junior -- of the equity,

1 the senior creditors have to be paid a hundred percent plus
2 interest.

3 In fact, Your Honor, if the plan just didn't give any
4 recovery to the equity Class 10 and 11, I bet you Dugaboy and
5 Mr. Dondero would be arguing that it violated the absolute
6 priority rule because senior classes, unsecured creditors,
7 could potentially receive more than a hundred percent of their
8 interest. And there's a case in the Southern District of
9 Texas, *In re MCorp*, where the Bankruptcy Court said that for a
10 plan to be confirmed, its stockholders eliminated, creditors
11 must not receive more than payment in full.

12 Excess proceeds, Your Honor, if any, have to go somewhere.
13 They can't go to creditors, so they have to go to equity. And
14 the absolute priority rule is not violated.

15 And how is Dugaboy harmed? They say they may want to buy
16 the contingent interests, and the lack of a marketing effort
17 violates the *LaSalle* opinion as well. And who holds the Class
18 B and Class C partnership interests that come before Dugaboy
19 that Dugaboy is concerned may have this opportunity rather
20 than them? Yes, it's Hunter Mountain, Your Honor, an entity,
21 like Dugaboy, that's owned and controlled by Mr. Dondero.

22 Accordingly, the argument that the plan violates the
23 absolute priority rule is actually a frivolous argument.

24 Turning now to unfair discrimination, Your Honor, Dugaboy
25 argued in its brief Monday that because the projected

1 distribution to unsecured creditors has gone down in the
2 recent plan projections, the discrepancy between Class 7 and
3 Class 8 is so large that that amounts to unfair
4 discrimination.

5 Again, the Court should first ask why is Dugaboy even the
6 right party to be making the objection. Its claim against the
7 Debtor to pierce the corporate veil, as I mentioned, is
8 frivolous. It's subject to objection. It didn't even bother
9 to have the claim temporarily allowed for voting purposes, as
10 did other creditors who thought they had a valid claim. Yet
11 this is another example of Mr. Dondero, through Dugaboy,
12 trying to throw as many roadblocks in front of confirmation as
13 he can.

14 But this argument, like the other ones, fails as well.
15 Class 8 contains the general unsecured creditor claims,
16 predominately litigation claims that have been pending against
17 the Debtor for years. The Debtor was justified in treating
18 the other unsecured creditors differently.

19 Class 6 consists of the PTO claims in excess of the cap,
20 which are of different quality and nature than the other
21 claims.

22 Class 7 consists of the convenience class. And it's
23 appropriate to bribe convenience class creditors with a
24 discount option for smaller claims to be cashed out for
25 administrative convenience.

1 Mr. Seery testified that when the plan was formulated, the
2 concept was to separately classify liquidated claims in small
3 amounts in Class 7 and unliquidated claims in Class 8. Mr.
4 Seery also testified that there's a valid business
5 justification to treat the -- hold business 7 -- Class 7
6 claims differently. These creditors had a reasonable
7 expectation of getting paid promptly, as compared to
8 litigation creditors, who would expect to be paid over time.

9 As the Court is aware, the litigation claims in Class 8
10 involve litigation that has been pending for several years in
11 the case of Acis, Daugherty, Redeemer, and more than a decade
12 in UBS.

13 And most importantly, as Mr. Seery testified, the
14 Committee and the Debtor had significant negotiation regarding
15 the classification and treatment provisions of the plan for
16 Class 7.

17 The Committee does have one constituent who is a Class 7
18 creditor. However, the other three creditors are all in Class
19 8 and hold claims in excess of \$200 million and supported the
20 separate classification and the different treatment.

21 So, Your Honor, discrimination, different treatment among
22 Class 7 and 8 is appropriate, and the different treatment is
23 not unfair. In the February 1 projections, the Class 8
24 creditors are estimated to receive 71.32 percent of their
25 claims, but that's just an estimate. As Mr. Seery testified,

1 the number can go up based upon the value he can generate from
2 the assets and, importantly, from litigation claims. Class 8
3 creditors could up end up receiving a hundred percent on
4 account of their claims. Class 7 creditors are fixed at 85
5 percent.

6 Giving Class 8 creditors the opportunity to roll the dice
7 and potentially get more or less than the 85 percent offered
8 to Class 7 is not at all unfair.

9 For these reasons, Your Honor, the Court has the ability
10 and should confirm the plan pursuant to the cram-down
11 provisions of 1129(b).

12 Your Honor, I'm now going to switch from the statutory
13 requirements to all the issues raised by the release,
14 injunction, and exculpation provisions.

15 I'd just like to take a brief sip of water.

16 Dugaboy -- I will first deal with the Debtor release
17 provided in Article 9(f) of the plan, which we claim is
18 appropriate. Dugaboy and the U.S. Trustee have objected to
19 the release contained in Article 9(f). Dugaboy objects
20 because it believes that the Debtor release releases claims
21 that the Claimant Trust or Litigation Trust have that have not
22 yet arisen, and the U.S. Trustee objects because it believes
23 that the release is a third-party release.

24 These objections have no merit, and they should be
25 overruled.

1 I would like to ask Ms. Canty to put up a demonstrative
2 which contains the provision Article 9(f) of the plan.

3 Your Honor, as set forth in this Article 9(f), only the
4 Debtor is granting any release. While that --

5 THE COURT: And for the record, it's 9(d)? 9(d),
6 right?

7 MR. POMERANTZ: 9(d)? 9(d), correct, Your Honor.

8 THE COURT: Yes. Okay.

9 MR. POMERANTZ: Sorry about that.

10 THE COURT: Uh-huh.

11 MR. POMERANTZ: While the release is broad, it does
12 not purport to release the claims of any third party. The
13 Claimant Trust and the Litigation Trust are only included in
14 the release as successors of the Debtor. The release is
15 specifically only for claims that the Debtor or the estate
16 would have been legally entitled to assert in their own right.

17 Section 1123(b) (3) (A) of the Bankruptcy Code provides that
18 a plan may provide for the settlement or adjustment of any
19 claims or interests belonging to the debtor or the estate, and
20 that's exactly what the Debtor release provides.

21 Accordingly, Dugaboy is wrong that the release effects a
22 release of claims that the Claimant Trust or the Litigation
23 Sub-Trust have that won't arise until after the effective
24 date. And the U.S. Trustee is simply wrong; there's no third-
25 party release aspect under the release.